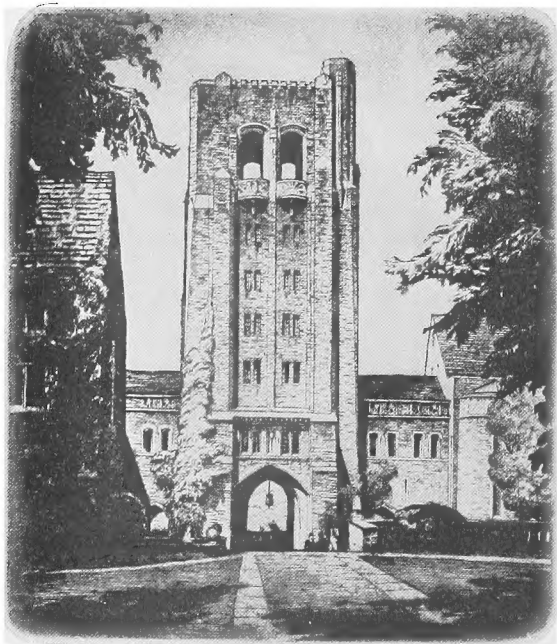


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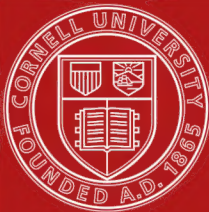
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A TREATISE
ON THE
LAW OF FIXTURES

BY
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PREFACE.

No work upon the law of fixtures has been presented to the profession since the able treatises of Marshall D. Ewell, in 1876, and Ransom H. Tyler, in 1877.

Along with the great development of American jurisprudence since that date, and the resulting complexity of legal principles and subjects, the law of fixtures has kept even pace, so that at the present day it, as a subject, not only holds a distinctive place in the substantive law of our land, but is well supported by a multitude of case law.

The highly useful encyclopaedias, and the numerous digests of the day, furnish ready references to the decisions of the courts upon the subject, as well as to the general principles obtaining, but for manifest reasons they cannot fill the place of the text-book, or, rather, the modern law treatise.

In preparing this work the author has kept in mind, particularly, several considerations: First, the needs of the active practitioner in being able to find readily the law obtaining in any forum in respect to a certain fixture, or as between parties sustaining a particular relation *inter se*; second, the desire for legal works that succinctly and concisely state the law of the subject as it is found, with ready deductions from general principles, thereby giving the immediate basis for the reason of the specific rule of law, and for an intelligent interpretation of the same; third, the ability to find at once a collation of the principles obtaining, along with the citation of cases in point, for application to a given case, either in

respect to the object affected or the relation sustained ; fourth, a logical development, analysis, and classification of the law.

To accomplish these ends the author has aimed, after showing the historical and logical development of the law of the subject, to state concisely in the text the rules and principles applicable to fixtures as enunciated by the courts of the land, without entering into an extended discussion of the numerous exceptions and opposing opinions found in different forums, following the encyclopaedic form, rather than the true text-book style ; and this, for the purpose of conciseness, and to avoid the undesirable unwieldiness of many text books, which renders them unfit for practical and ready use. In the notes, however, besides a full verification of the text, an attempt has been made to elucidate the special rules and principles applying to particular relations and special objects, together with a full citation of authorities. Furthermore, the notes, as well as the text, have been indexed for the purpose of affording every facility to the practitioner in finding the law in point.

The author has aimed to cover the field of this subject fully, and hopes that the work may subserve, in a measure, the purposes of its existence, as well as satisfy the apparently present need of a text-book on the law of Fixtures.

HARRISON A. BRONSON.

Grand Forks, N. Dak., April, 1904.

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LAW OF FIXTURES.

CHAPTER I.

FIXTURES DEFINED.

- § 1. The term generally.
- 2. Removable fixtures.
- 3. Summary—Three definitions.

§ 1. The term generally.

The proper definition of the term “fixtures” has given rise to nearly as much discussion and variance of opinion as the definition of “fraud.”¹ The confusion that has been oc-

¹ The term “fixture” itself, although always applied to articles of the nature of personal property which have been affixed to the land, has been used with different signification until it has become a term of ambiguous meaning. This ambiguity, which has attended the use of the word in various adjudications and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

“The term ‘fixture’ was early seized upon by legal writers to supply a deficiency in their technical terminology, but was not entirely reclaimed from its popular use, and fixed in that strictness and uniformity of meaning requisite to scientific certainty, and, as used by legal writers, it has continually fluctuated between a technical and a popular use. We have, therefore, many kinds of fixtures, and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant; a different thing between vendor and vendee; is one thing in the economy of trade; another for the purposes of agriculture. Originally, the term denoted those movable things which had become immovable by connection with

(1)

casioned flows partly from the two ideas or conceptions involved in the nature of fixtures, for a fixture, being itself a chattel, possesses many characteristics of personal property; then, by its annexation to the freehold, it partakes of the nature of real property. If, between the parties, the fixture retains, predominantly, its personal characteristics, it is personal property; if the other side of its dual nature prevails, it becomes, in and of itself, real property.

Many text writers and courts take the position that only the so-called "removable fixtures" are properly termed "fixtures," and that the chattel permanently and irremovably affixed to the freehold is nothing more or less, *per se*, than realty. To the contrary, other text writers and courts maintain that the term "fixtures" is only correctly applied to those articles of a chattel nature that are permanently and irremovably affixed to the realty, and that the proper term to designate removable chattels is "personal property." The former class define fixtures as "personal chattels annexed to the realty, removable at the option of the person who annexed them."²

the freehold; but presently it came to mean those things which, although attached to the freehold, could, under certain circumstances, be removed. In its popular use, it meant affixed or fastened to the freehold; and in the early cases, and many of the later ones, we find the popular definition of the term sweeping everything before it. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 609, 17 L. Ed. 886.

In *Hawaii*, in *Kahinu v. Aea*, 6 *Hawaii*, 68, a two-story wooden building was considered a fixture and a part of the realty, in accordance with the American, English, and continental law.

² A fixture is something substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. *Pickerell v. Carson*, 8 *Iowa*, 544; *Prescott v. Wells*,

The latter class define as follows: "A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and part and parcel of it."³

Fargo & Co., 3 Nev. 82. "Fixtures," according to one use of the term, are personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. There is much dispute among the authorities as to what is a proper definition. Cyclopedic Law Dict. p. 376.

The term "fixtures" is used more generally with reference to such inanimate things of a personal nature as have become affixed or annexed to the realty, but which may be severed, disunited, or removed by the party or his personal representatives, who has so affixed them without the consent of the owner of the freehold. *Hallen v. Runder*, 1 Crompt. M. & R. 266, 3 Tyr. 959, 3 Law J. Exch. (N. S.) 260.

"The word 'fixtures' need not import things affixed to the freehold, nor has the word necessarily acquired that legal sense. It is a modern word, and is generally understood to comprehend any article which a tenant has a power of moving; but even this is not its necessary meaning,—it only means something affixed to another. Baron Parke, in *Sheen v. Rickie*, 5 Mees. & W. 175.

³ A fixture is an article which was a chattel, but which, by being fixed to the realty, became accessory to it and a part thereof. *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

It is difficult, if not impossible, to give a definition of the term which may be regarded as of universal application. Almost every court and every text writer has attempted to define the term. None of these definitions is infallible or of universal application, but each is of service in determining whether an article is or is not, in a given case, a fixture. These definitions may be found collected in almost any law dictionary or text book on the subject. We shall neither quote them nor attempt to give a definition of our own, but simply say that they all agree that "fixtures," in the primary meaning of the term, and distinguished from movable and tenant's fixtures, means chattels annexed to the realty, so as

There is still another definition given by some, more comprehensive in its scope than the other definitions, and including all the component elements of a fixture, as follows: "Fix-

to become a part of it. *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744.

Alabama: *De Lacy v. Tillman*, 83 Ala. 155; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77.

Arkansas: *Witherspoon v. Nickels*, 27 Ark. 332.

Connecticut: *Capen v. Peckham*, 35 Conn. 94; *Tolles v. Winton*, 63 Conn. 440.

Iowa: *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Johnson v. Mosher*, 82 Iowa, 29.

Kansas: *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471.

Kentucky: *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. 359.

Maine: *Parsons v. Copeland*, 38 Me. 537; *Strickland v. Parker*, 54 Me. 263.

Massachusetts: *First Parish in Sudbury v. Jones*, 8 Cush. 184.

Michigan: *Aldine Mfg. Co. v. Barnard*, 84 Mich. 636, 48 N. W. 280.

Minnesota: *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159.

Mississippi: *Richardson v. Borden*, 42 Miss. 71, 2 Am. Rep. 595; *Weathersby v. Sleeper*, 42 Miss. 732.

Missouri: *Cooke v. McNeil*, 49 Mo. App. 81; *Graves v. Pierce*, 53 Mo. 423; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756.

Nevada: *Brown v. Lillie*, 6 Nev. 244.

New Hampshire: *Langdon v. Buchanan*, 62 N. H. 657; *Wadleigh v. Janvrin*, 41 N. H. 520, 77 Am. Dec. 780.

New Jersey: *Feder v. Van Winkle*, 53 N. J. Eq. 370.

New York: *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Laffin v. Griffiths*, 35 Barb. 58; *Hart v. Sheldon*, 34 Hun, 38.

North Carolina: *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903.

Pennsylvania: *Harmony Bldg. Ass'n v. Berger*, 99 Pa. 320.

Vermont: *Harris v. Haynes*, 34 Vt. 220.

tures are chattels or articles of a personal nature which have been affixed to the land in such a way as not to lose their identity.”⁴ This definition is in accordance with the derivative meaning of a fixture, which, from the Latin *affixum*, meant “a thing attached to or fastened to,” and hence it includes within its scope the articles embraced within the former definitions, regardless of the fact whether the chattel be removable or not.

The maxim, *Quicquid plantatur solo, solo cedit*, is invoked by those who assert that a fixture, properly speaking, is irremovable and goes with the land. They say that the term “removable fixtures” is ambiguous, contradictory, and a solecism; for the term “fixture” signifies something fixed to the

Wisconsin: *Huebschmann v. McHenry*, 29 Wis. 655.

United States: *Van Ness v. Pacard*, 2 Pet. 137.

Tiedeman, *Real Property*, p. 5.

* A fixture is an article of a personal nature annexed to the freehold. *Merritt v. Judd*, 14 Cal. 64.

Amos & Ferard, Fixtures, p. 1; *Tyler, Fixtures*, p. 42; *Gibbons, Law of Fixtures*, p. 15; *Burrill, Law Dict.* tit. “Fixtures.”

The primary meaning of the word “fixture” is that which is fixed or attached to something as a permanent appendage. In law it takes a wider range. Anything fixed or attached to a building, and used in connection with it, is a fixture, whether it be a permanent appendage or not. Hence, in legal jurisprudence, there are movable fixtures and immovable fixtures. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture, and it is a chattel. It is no part of the realty, and does not pass with a conveyance of the freehold. If, however, it be so connected with the building as that it cannot be severed from it without injury to the building,—a disturbance of its rounded completeness,—then it is a part of the realty, and it passes with a conveyance of the soil. *Stone, C. J., in Capital City Ins. Co. v. Caldwell Bros.*, 95 Ala. 77.

freehold, and, when articles annexed to the realty are removable, there is no need of calling them fixtures,—“personal property” is the appropriate name by which to designate them.⁵ On the other hand, those who assert the removability of fixtures say that the common-law maxim, *Quicquid plantatur solo, solo cedit*, was early modified in its rigor by numerous exceptions;⁶ that these exceptions included just the subject-matter which is properly denominated by the name of “fixtures.” Therefore, the term “fixtures” should be applied to those annexed chattels that are removable at the option of the annexor.

§ 2. Removable fixtures.

In answer to the objection that a “removable fixture,” as a term of general application, is a solecism,—a contradiction in words,—this latter class, which asserts the propriety of the term “removable fixtures,” affirms that the term “fixtures” means only something attached to or fastened to another thing,—a status of fixation or annexation,—as distinguished from a movable, and hence the term does not imply that the chattel so annexed is not removable at the option of the annexor. Then, again, it is said that, if the term “fixtures” be applied to chattels which, by reason of their annexation to the freehold, have become part and parcel thereof, and irremovable without the severance or permission of the owner of the realty to which they are attached, there is no necessity of any distinct terminology or legal term to designate chattels so annexed, since they are part and parcel of the freehold, subject to all of the rules governing real

⁵ Hill, *Fixtures*, p. 14, and cases cited.

⁶ 2 Kent, *Commentaries*, p. 343.

property, and standing in no more need of a separate nomenclature than grass, growing trees, or the soil of the earth. "Removable fixtures," however, while annexed, partake to some extent both of the incidents peculiar to personal property and of the incidents characteristic of realty, and it is precisely because of this dual character of the chattels while so annexed that a reason exists for a distinct term by which such chattels may be designated, on the one hand, from mere personal property, and, on the other, from realty.⁷

§ 3. Summary—Three definitions.

Thus it will be seen that there are three ways by which the term "fixtures" may be defined: First, it may be considered as applying only to those chattels that have become so annexed to the realty as to be a part thereof, and consequently not removable against the will of the owner of the realty; second, it may be applied only to those chattels which, though annexed to the soil, may be severed and removed at the option of the one who annexed them; third, the term "fixtures" may be deemed to embrace all those chattels which, by reason of their annexation to the land, partake both of the nature of personalty and realty, irrespective of the question whether they are removable or not. This confusion of definition has arisen mostly through a different application of the term "fixtures." Thus, many courts use the term "fixtures" as applying to those articles so annexed as to be a part of the realty, in contradistinction to the term "removable fixtures," or "tenant's fixtures." Other courts, in consider-

⁷ Ewell on Fixtures, p. 6; Amos & Ferard, Fixtures, p. 1; Bouvier, Law Dict. tit. "Fixtures"; Tyler, Fixtures, p. 37 et seq.; Hallen v. Runder, 1 Crompton, M. & R. 266; Sheen v. Rickie, 5 Mees. & W. 175.

ing this subject, define fixtures, in a generic sense, as inclusive of removable fixtures and tenant's fixtures; hence arises the difficulty in framing a definition of the term that will be of universal application. In this work the term "fixtures" will be considered, in its generic sense, as inclusive of both removable and irremovable fixtures, although it must be noted that the majority of the cases treat of the term "fixtures" only as applicable to chattels so annexed to the realty as to be a part thereof.⁸

⁸ See ante, note 3, and cases there cited.

CHAPTER II.

FIXTURES HISTORICALLY TREATED.

- § 4. Early state under the feudal system.
- 5. Rise of the villein class.
- 6. Exception to common-law rule established as to trade fixtures.
- 7. The leading case of *Elwes v. Maw*.
- 8. Reasons for the exception as to trade fixtures.
- 9. Extension of the exception to cases of a mixed character.
- 10. Extension of the exception to ornamental fixtures.
- 11. Like extension to domestic fixtures.
- 12. Reason for the exception in cases of ornamental and domestic fixtures.
- 13. The exception to the rule considered.
- 14. The exception to the rule not extended to agricultural fixtures.
- 15. Intention as applied to the law of fixtures.
- 16. Conclusion.

§ 4. Early state under the feudal system.

The law of fixtures affords a striking illustration of the manner in which the necessities of a people may evolve from an unsuitable social system a set of principles better adapted to their situation and needs. Fixtures, as such, were unknown to the early English; the principles of the law of fixtures as later developed were incompatible with the conception and comprehension of the system by which they were governed. The feudal system recognized practically only one kind of property,—real estate. Personal property was conceived to be those things which could accompany the person,—which were asportable in their nature. The maxims,

Cujus est solum, ejus est usque ad coelum, Quicquid plantatur solo, solo cedit, and *Accessio cedit principali*, received their full literal expression under this system. Furthermore, the status of those who might claim articles, now known as “fixtures,” under the principles and conception of the system then in vogue, precluded the very idea of the existence of the right.

Under the feudal system, the tenant had no civil existence independent of, or as against, his lord, but, as far as his tenancy was concerned, he was considered the mere bailiff or agent of his lord. In this relation, contract had neither place nor part. The menial duties of the villein, and his restricted personal freedom, together constituted a phase of relationship that prohibited the idea of property rights. It is a matter of history that this relation continued, in a more or less modified form, for several centuries; so it is little to be wondered that the rigors of this system are still apparent in our present law. It is therefore readily understood why the word “fixtures,” or its use as a term, is not alluded to in these earlier times,¹ for, as Chancellor Kent observes:

¹ “The word ‘fixture’ does not occur either in the abridgment of Bacon or in that of Viner as a substantive head of law; nor is it mentioned among the ‘Termes de la Ley.’ It occurs, indeed, in Comyn’s Digest, but in the addenda only, and not in the principal body of that work. In the Year Books it is as infrequent; nor do the smaller compendiums, digests, and abridgments of our early law present the name with any greater prominence or frequency. It is true, indeed, that the substance of the law of fixtures is found in all those early records; but then the materials of it there given are not only scanty in their amount, but are also stowed away among the subordinate divisions of other and seemingly unconnected heads of law. Thus, in the Abridgment of Bacon, we find the following somewhat obscure allusion to them under the head of ‘Executors

"The law of fixtures is in derogation of the original rule of the common law which subjected everything affixed to the freehold to the law governing the freehold."² At first the law of fixtures was identical with and included in that of waste, which was essentially a common-law action for injury done to realty. But, by a course of judicial legislation, there gradually arose certain exceptions to this law of waste, and certain rules and principles applicable to chattels annexed to the freehold, so as, in time, to establish a rule of property which later developed into our modern law of fixtures. The rise and development of this law is instructive.

§ 5. Rise of the villein class.

In England, during the reigns of Edward I. and Edward II., the villein class under the feudal system gradually acquired greater and more civil rights, and, as the civil rights of the villeins developed, the law came to recognize the existence of property rights in the villein as tenant of the landlord; hence the early cases bearing on the subject of fixtures were between lord and villein or tenant, sustaining the relationship of landlord and tenant. Thus, in the reign of Edward II., we find a case between a lord and tenant respecting the right of the latter to remove a certain

and Administrators:' '(H) What shall be deemed the testator's personal estate or assets in the hands of the executor; and herein * * * (3) what shall be deemed his personal estate; and therein what things shall go to the heir, and not to the executor.' And again we find numerous matters entered under the head of 'Waste or Wast,' which we, at first sight, imagine, might as correctly have been entered under the head of 'Fixtures,' and yet they nowhere appear under this latter head." 3 Alb. Law J. p. 407.

² 2 Kent, Commentaries, 343.

house that he had built upon the land during his occupancy.³ This house was an agricultural fixture, and the act of the tenant in tearing down and removing the house was adjudged waste. So, many other cases in 24 Elizabeth, in 41 Elizabeth, and on down through to the great case of *Elwes v. Maw*,^{3a} might be cited to show the persistent attempts of the tenant to modify directly the harshness of the common-law rule relative to things annexed to the freehold;⁴ but these attempts were fruitless. These cases related to agricultural fixtures, and the force of precedent was too strong to overthrow the rule.

³ "Thus we read in the Year Book (1, 518) that in the 17 Edw. II. a person who was the lessee of land built a house upon the land, and afterwards pulled it down, and was adjudged guilty of waste in so doing. Lord Coke, in apparent reference to the case, remarks (Co. Litt. 53a) that there was waste in the building of the house, and also new and further waste in afterwards suffering it to waste." 3 Alb. Law J. p. 408.

^{3a} *Elwes v. Maw*, 3 East, 38.

⁴ *Cooke's Case*, Moore, 177, Pirryam, J.: "When the lessee takes glass windows or doors which were already in the house at the time of the granting of the lease, such taking is waste; moreover, if the lessee annexes anything to the frank tenement, as outer doors, while others are less in the nature of necessities,—for example, the inner doors which separate the apartments within the house. It seems, therefore, that a lessee who erects the posts for outer doors, and slings the doors upon them, cannot afterwards remove the doors during his term; but it is otherwise with inner doors."

Lord Darcy v. Askwith, Hobart, 234: "It is generally true that the lessee hath no power to alter the nature of the thing demised. He cannot turn meadow into arable, nor stub a wood to make it pasture. * * * A lessee may build a new house where none was before, but that must be every way at his own charge. * * * And yet if he keep it not in repair, an action of waste lies."

§ 6. Exception to common-law rule established as to trade fixtures.

But the tenant as a tradesman, when commerce became more extensive, finally was able to work a modification of the harsh rule of the feudal system. Business and trade operations gradually required more extensive appurtenances, and tenants engaged in any extensive trade or business operation were compelled to place on their landlords' property articles of more substantial and permanent character to enable them to carry on their business. If the old rule that everything annexed to the land should go to the landlord were enforced in its strict literalness, business operations would be greatly retarded on account of the unwillingness of the tenants to make any improvements; hence there first arose a distinction in relation to articles affixed to the freehold for purposes of trade and manufactures. This distinction was not clear cut in the first cases, for the reason that the right to remove articles, if granted at all, was so given upon the ground that their mode of annexation did not constitute them a part of the realty. This naturally arose from the fact that chattels, in early times, were more of an asportable nature, and the question would first arise whether they were annexed or not to the freehold. Ferard brings out this fact in his work on Fixtures.⁵ However, the

⁵ "The earliest authority on this subject to which it will be necessary to advert occurs in the Year Book 42 Edw. III. p. 6, pl. 19. It was an action of waste brought against a lessee for removing a furnace which he had erected and affixed to the walls of a house demised to him for a term of years. The point was then raised whether the removal of the furnace was justifiable or if it amounted to waste, and this question was, after discussion, adjourned as doubtful, and was left undetermined.

"The next in order is a case in the Year Book 20 Henry VII. p. (13)

cases seem to have involved articles which would be termed "trade fixtures," and certain it is that in the time of Lord

13, in which the question was whether a furnace fixed to the freehold with mortar should go to the executor or to the heir of the owner of the fee who had put it up. In the course of the judgment in this case the court laid down the following proposition: 'If a lessee for years set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation, during the term he may remove them. And so of a baker. And it is no waste to remove such things within the term, by some.' The report then states that in 42 Edw. III. it was doubted whether this was waste or not.

"This case is generally adduced as the first which in terms recognizes the right of a tenant to remove fixtures. It is quoted, moreover, as the great authority for the prevalence of a rule, in very early times, in favor of trade fixtures. For it is insisted that the privilege which is there said to belong to the lessee is admitted in respect of articles of trade only, and is to be understood as a right arising solely out of the principle of protecting commerce and manufactures. The expression in the original which has given rise to the supposition is, 'Pour occupier son occupation;' and it has been imagined that the instances of the dyer's vessels are intended, not merely to signify additions made by a tenant for his common domestic accommodation, but to indicate fixtures put up by him expressly in relation to the trade which he is carrying on upon the premises.

"It may, however, be doubted if this is a fair inference from the case cited. For, in the first place, it deserves to be mentioned that in another report, or rather abstract, of the case in the Year Book 20 Hen. VII., which was published at a subsequent but very early period, the passage upon which the supposition in question mainly proceeds is particularly introduced, but the expression, 'Pour occupier son occupation,' is left out. If this circumstance had been suggested to the courts in the discussion of the subsequent cases, it would probably have been thought to merit attention, as tending to show that the rule laid down by the judges in the time of Henry the Seventh was not universally considered to have been founded

Holt, in Poole's Case,⁶ the exception in favor of trade fixtures was clearly enunciated, for he expressly asserted that the right existed at common law in favor of trade, and to en-

on an exception arising solely out of trade. And the inference that trading fixtures were not particularly and exclusively intended by the judges in this case will more clearly appear from the remark that follows in the report, viz.: That in 42 Edw. III. it was doubted whether this was waste or not. Now, on referring to the case in 42 Edw. III. p. 6, pl. 19, it will appear that no allusion whatever is made to an exception in favor of trade; neither is it mentioned or implied that the furnace there in dispute was erected for a trading purpose. Again, in the same sentence in which the dyer's vat is mentioned, and immediately before it, is put the instance of a furnace erected by a lessee, and this is said to be removable, like the vat. And so far from its being intimated that the furnace is connected with trade, it is, on the contrary, described as put up for the convenience of the lessee,—'pour son avantage,' or, as the abridgment has it, 'pour son pleasure.'

"But, further, if this principle of allowing an exemption on the ground of trade had been clearly recognized in the case in question, it might be expected that it would have been applied to the solution of subsequent cases, but the contrary is the fact, and all the ancient cases which follow the decision of 20 Hen. VII. are found to proceed upon a distinction depending altogether upon the mode of annexation. Thus, in a case which occurred immediately afterwards, and before the same judges, it was laid down by the court that if a lessee makes an erection, as a furnace or post, etc., and fixes it to the soil, or to the middle of the house only, and not to the walls, he may take it away. Nothing is said in this case of a distinction in respect of trade; on the contrary, Kingsmill, J., apparently in allusion to the particular instances of vats in a brew house or dye house, relies solely on their construction and annexation, and says the removal of such things would not be waste, because the house would not be impaired by it. So, lastly, in the cases which followed some time after those in the Year Books, there is no recognition whatever of any peculiar privilege in regard to trade;

⁶ Poole's Case, 1 Salk. 368.

courage industry. In this case a soap boiler, an undertenant, had erected, for purposes of trade, certain vats, coppers, tables, partitions, and paved the back side, etc. All of these things had been taken under execution against him. The first lessee brought an action against the sheriff for the damage occasioned to the house for which he (the lessee) was liable to the lessor. Lord Holt held that the soap boiler might remove, during his term, the vats set up in relation to trade. The right to remove trade fixtures became established from this time. The right was extended in equity, not only to those parties sustaining the relationship of landlord and tenant, but also to executors of tenants for life, in tail, or in fee. The principal subsequent cases,⁷ down to

for *Cooke's Case* (24 Eliz.) [Moore, 177] is wholly silent upon it; and in a case reported in Owen, 70 [Day v. Austin], and Cro. Eliz. 374 [Day v. Bisbitch], which respected the power of a sheriff to seize a furnace under an execution against a termor, the article is expressly stated to have been erected for the use of a dyer, and the court, adverting to the right of the termor himself in such a case, determine it by the circumstance of the article being fixed to the walls, and not to the middle of the house. On this particular ground they consider that the furnace would not be removable; and the principle of an exemption on the ground of trade is altogether unnoticed.

"Upon the whole, then, it can scarcely be inferred that the expressions used by the court in 20 Hen. VII. pl. 13, were employed in any other sense than as mere general examples of fixtures, the object of which was to illustrate the legal doctrine of an exception introduced for the benefit of all tenants alike, by a less rigid construction of the old rule of law. Indeed, with regard to the dictum itself, it should be observed that it is entirely extrajudicial, and appears in a decision in which the judgment of the court proceeded on a totally different principle." *Amos & Ferard, Fixtures*, pp. 17-21.

⁷ "In the case of *Lawton v. Lawton*, 3 Atk. 13, the question was whether a fire engine or steam engine set up for the benefit of a

Elwes v. Maw, the leading case upon fixtures, simply amplify the doctrine, allowing the exception in favor of trade fixtures.

colliery by a tenant for life should, at his death, go to his executors as part of his personal estate, or to the tenant in remainder.

“Lord Hardwicke, in his judgment, thus explains the principle of the rule respecting trade erections: ‘To be sure, in the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh’s time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon of relaxing this strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term.’

“In the case of Lord Dudley v. Lord Warde [1 Amb. 114] * * * there was a similar question as to the right of the executor of a particular tenant to take a fire engine as against the remainderman. On this occasion, Lord Hardwicke observed: ‘Some general rules are very clear, as, what is annexed to the freehold is to be considered a part of it; and yet there are some exceptions to that rule as between landlord and tenant,—what is erected by the latter for the sake of trade may be removed, though fixed to the freehold. The determinations have been from consideration of the benefit of trade.’ * * *

“In Lawton v. Salmon [3 Atk. 16, in notes], in king’s bench, before Lord Mansfield, there was a question between the executor and the heir of a person who, some years before his death, had placed certain vessels, called ‘salt pans,’ fixed to the ground, in buildings erected upon his salt works, and after consideration the opinion of the court was given in favor of the heir, on the particular grounds explained in another chapter of the work. But in the course of the judgment, Lord Mansfield states that there had been a relaxation of the strict rule, for the benefit of trade, between landlord and tenant; that many things might be taken away which could not formerly, such as erections for carrying on any trade, when put up by the tenant. ‘It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works. He might very well have said: “I leave

§ 7. The leading case of *Elwes v. Maw*.

Lord Ellenborough in this leading case has brought out prominently the distinction between the two classes of fixtures,—agricultural and trade.^s In discussing the rule that the removing by the tenant of anything that he has annexed to the freehold during his term constitutes waste, he says: “But this rule, at a very early period, had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favor of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book 42 E. 3, 6, the right of a tenant to remove a furnace erected by him during his term is doubted and adjourned. In the Year Book of the 20 H. 7, 13, a and b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down that, ‘if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things

the estate no worse than I found it.” That, as I stated before, would be for the encouragement and convenience of trade and the benefit of the estate.’

“So, in *Penton v. Robart*, 2 East, 90, it was said by Lord Kenyon that ‘the old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way,—in favor of the tenant, in support of the interests of trade, which is become the pillar of the state.’” *Amos & Ferard, Fixtures*, pp. 22, 23.

^s *Elwes v. Maw*, 3 East, 38.

within the term by some; and this shall be against the opinion aforesaid.' But the rule to this extent in favor of tenants is doubted afterwards in 21 H. 7, 27, and narrowed there by allowing that the lessee for years could only remove, within the time, things fixed to the ground, and not to the walls of the principal building. However, in process of time, the rule in favor of the right in the tenant to remove utensils set up in relation to trade became fully established.

* * * But no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself, who built them during his term. * * * In the case of *Fitzherbert v. Shaw*, 1 H. Bl. 258, we have only the opinion of a very learned judge indeed—Mr. Justice Gould—of what would have been the right of the tenant as to the taking away a shed built in brick work, and some posts and rails which he had erected, if the tenant had done so during the term; but as the term was put an end to by a new contract, the question what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at *nisi prius*, and, when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton v. Robart*, 2 East, 88, it was the case of a varnish house, with a brick foundation let into the ground, of which the woodwork had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade, and the tenant was entitled to the same indulgence in that case which, in the cases already considered, had

been allowed to other buildings for the purposes of trade,—as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning which obtains in modern times in favor of the interests of trade, upon which ground it might be properly supported, goes further and extends the indulgence of the law to the erection of greenhouses and hothouses by nurserymen, and, indeed, by implication, to buildings by all other tenants of land, there certainly exists no decided case, and, I believe, no recognized opinions or practice on either side of Westminster Hall, to warrant such an extension. The *nisi prius* case of *Dean v. Allalley*, reported in Mr. Woodfall's book (page 207) and Mr. Espinasse's (vol. 3, p. 11), is a case of the erection and removal by the tenant of two sheds, called 'Dutch barns,' which were, I will assume, unquestionably fixtures. Lord Kenyon says: 'The law will make the most favorable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enabled him to carry it on with more advantage. It has been so holden in the case of cider mills, and other cases, and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term.' Lord Kenyon here uniformly mentions the benefit of trade as if it were a building subservient to some purpose of trade, and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought buildings erected by tenants for the purposes of farming were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of

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trade. But the case of buildings for trade has been always put and recognized as a known, allowed exception from the general rule which obtains as to other buildings; and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered an exception."

§ 8. Reasons for the exception as to trade fixtures.

Thus it may be seen that the ancient, strict rule of the common law, that whatever was affixed to the soil became part and parcel of the same, was first modified by a series of judicial determinations, so as to allow an exception in favor of chattels affixed to the soil for the purposes of trade. The reason for the relaxation can doubtless be explained on the grounds of public policy. The commercial interests of the country, becoming great and important, demanded that capital employed in trade operations in the way of improvements upon land should not be lost to its owner at the expiration of his lease or term. The spirit of commercialism gave birth to the necessity of an exception.

It will appear that the trade fixtures that were removable under the early exception to the common-law rule included mere utensils or instruments of trade machinery employed in trade, or that which might be deemed accessory to these articles in supporting or protecting them. Then, too, the articles or the parts of which they were composed were, after their removal, capable of being again employed for the same or similar purposes. These first cases, therefore, cannot be considered, in themselves, to have carried the right of removal of trade fixtures to any great extent. But in the *dicta* and general observations of the court that are met with in

some of the decisions, the exception in favor of trade is found to be laid down in very comprehensive and general terms; for not only are utensils and instruments of trade specified, but buildings and erections are frequently mentioned, without any qualification as to their nature or construction.

Thus the early cases, under the exception above referred to, accorded the lessee the right to remove machinery, steam engines, and fire engines,⁹ vessels and pipes in brew houses,¹⁰ salt pans,¹¹ cider mills,¹² vats, coppers, and partitions.¹³ Thence the exception became so comprehensive as to include buildings, whether of an accessory character or not, such as sheds,¹⁴ Dutch barns,¹⁵ varnish houses,¹⁶ lime kilns,¹⁷ and other permanent buildings of an accessory character.¹⁸ In determining the question whether a particular chattel was a trade fixture or not, the decisions of the early cases seem to be based upon the purpose to which the article was put, with scarcely any reference to the nature, structure, or mode of annexation of the fixture; yet it was an early maxim of the law that the principal thing shall not be destroyed, or

⁹ *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, 1 Amb. 113.

¹⁰ *Lord Hardwicke in Lawton v. Lawton*, 3 Atk. 13.

¹¹ *Lawton v. Salmon*, 1 H. Bl. 259, 3 Atk. 16.

¹² *Amos & Ferard, Fixtures*, p. 27.

¹³ *Poole's Case*, 1 Salk. 368.

¹⁴ *Fitzherbert v. Shaw*, 1 H. Bl. 258.

¹⁵ *Dean v. Allalley*, 3 Esp. 11.

¹⁶ *Penton v. Robart*, 2 East, 88, 4 Esp. 33.

¹⁷ *Thresher v. East London Waterworks Co.* (Hilary Term 1824) 2 Barn. & C. 608.

¹⁸ *Elwes v. Maw*, 3 East, 38.

even essentially impaired, by taking away the accessory.¹⁹ The early decisions are far from harmonious, yet their general tendency can be readily seen to have constantly enlarged the exception made in favor of trade fixtures.

§ 9. Extension of the exception to cases of a mixed character.

The extension of the exception to fixtures employed in the working of coal mines, collieries, and nursery fields and gardens is easily comprehended. Although the application of the fixture in such cases seems to constitute it an agricultural fixture, inasmuch as it is erected with a view of procuring and enjoying the profits of the land, yet operations of this character were considered to be more in the nature of trade operations, and to be expressly carried on for trade purposes; hence fixtures so erected were removable. Lord Kenyon, in *Penton v. Robart*,²⁰ says: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way,—in favor of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighborhood of this metropolis, who spend thousands of pounds in the erection of greenhouses and hothouses, etc., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the

¹⁹ *Lawton v. Lawton*, 3 Atk. 15; 2 Smith, Lead. Cas. 116.

²⁰ *Penton v. Robart*, 2 East, 91.

necessary course of their trade? If it were otherwise, the very object of their holding would be defeated."

In respect to nurserymen and gardeners, the exception based on the ground of their carrying on a species of trade permitted them to remove trees, shrubs, and the other produce of their grounds planted by them with an express view to sale,²¹ and in some cases²² to remove hothouses and greenhouses erected at their expense. It may be thus observed how the exception in relation to trade fixtures evolved, embracing in its scope many fixtures that were of a mixed nature, if not of a purely agricultural character.

§ 10. Extension of the exception to ornamental fixtures.

But the exception to the maxim, *Quicquid plantatur solo, solo cedit*, was not to remain solely with that class of fixtures known as "trade fixtures." The early cases granted an exception in favor of trade fixtures, and denied the right to any other class of fixtures; but later an exception based upon a different ground became engrafted upon the rule in favor of fixtures erected for ornament or convenience. In 1701, Lord Keeper Wright²³ held that a furnace, though fixed to the freehold, and purchased with the house, and also hangings nailed to the walls, should be accounted as personalty. In 1706, in the case of *Beck v. Rebow*,²⁴ it was adjudged that hangings and looking glasses were only matter of ornament, and not to be taken as part of the freehold, even though fastened thereto with nails and screws. In 1741,

²¹ *Penton v. Robart*, 2 East, 91; *Wyndham v. Way*, 4 Taunt. 316.

²² *Penton v. Robart*, 2 East, 91.

²³ *Squier v. Mayer*, Freem. Ch. 249.

²⁴ *Beck v. Rebow*, 1 P. Wms. 94.

Lee, C. J., at *nisi prius*, held that hangings, tapestry, and iron backs to chimneys belonged to the executor, and not to the heir.²⁵ In 1743, Lord Chancellor Hardwicke²⁶ observed: "What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done." In 1802, Lord Ellenborough²⁷ said: "The indulgence in favor of the tenant for years, during the term, has been carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like." But in 1820, in the case of *Buckland v. Butterfield*,²⁸ the right to remove a conservatory attached to a

²⁵ *Harvey v. Harvey*, 2 Strange, 1141.

²⁶ *Lawton v. Lawton*, 3 Atk. 13-16. In 1750, Lord Hardwicke, in *Ex parte Quincy*, 1 Atk. 477, says: "During the term, a tenant may take away chimney pieces, and even wainscot. * * * Several sorts of things are often fixed to the freehold, and yet may be taken away, as beds fastened to the ceiling with ropes; nay, frequently nailed, and yet no doubt but they may be removed."

²⁷ *Elwes v. Maw*, 3 East, 38, 53.

²⁸ *Buckland v. Butterfield*, 2 Brod. & B. 54. This was an action on the case in the nature of waste by a tenant for life against the assignees of her lessee from year to year, who had become bankrupt. The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At Buckingham Lent assizes, 1820, before Graham, B., the case proved was that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory which had been purchased by the bankrupt, and brought from a distance, was by her erected on a brick foundation fifteen inches deep. Upon that was bedded a sill, over which was framework covered with slate. The framework was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling house by eight cantalevers, let nine inches into the wall, which cantalevers

house for purposes of ornament was denied, the mode of its annexation being held to preclude the right of removal; yet the case is particularly noteworthy in that it defines and

supported the rafters of the conservatory. Resting on the cantilevers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. Two windows opened from the dwelling house into the conservatory,—one out of the dining room, another out of the library. A folding door was also opened into the balcony, so that, when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather. Surveyors who were called stated that the house was worth £50 a year less after the conservatory and pinery had been removed. The learned judge, having stated his opinion that the plaintiff ought to recover at least for the pinery, and probably for the conservatory, the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for £300 damages to her. The counsel for the defendant obtained a rule nisi for a new trial, on the ground that this conservatory, though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removable by the tenant, and that at all events the damages were excessive. The counsel for the plaintiff showed cause against the rule.

After due consideration, Dallas, C. J., delivered the judgment of the court, in doing which he said: "This was an action on the case tried before Graham, B., at the last Aylesbury assizes. The question in the cause, as far as relates to the motion now before us, was whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold, and to make the removal of it waste. In *Elwes v. Maw*, will be found at length all that can relate to this case, and to all cases of a similar description. It is not necessary to go into the distinctions there pointed out, as they relate to different classes of persons, or to the subject-matter itself of the inquiry. Nothing will here depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture, for this is merely the case of an ornamental building, constructed by the party for his pleasure, and the question of annexation arises on the

limits the privileges of tenants in such cases, and distinctly affirms the right to remove fixtures used for ornamental

facts reported to us; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand, it is clear that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is that, when a lessor, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed that they are exceptions only, and therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscots, Lord Hardwicke treats it as a very strong case. Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord Kenyon in 2 East, 88, referred to at the bar. The case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present; but it has been cited for the dictum of Lord Kenyon, which seems to treat greenhouses and hothouses erected by great gardeners and nurserymen as not to be considered as annexed to the freehold. Even if the law were so, which it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present; but in *Elwes v. Maw*, speaking of this dictum, Lord Ellenborough says there exists no decided case on either side of Westminster Hall to warrant such an extension. Allowing, then, that matters of ornament may or may not be removable, and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer;

purposes. In 1835, in the case of *Leach v. Thomas*,²⁹ it was expressly held that an outgoing tenant might remove a marble chimney piece which is of an ornamental nature, put up by himself during his tenancy, but not a chimney piece which is not ornamental.

§ 11. Like extension to domestic fixtures.

This exception not only included articles devoted to a purely ornamental purpose, but also those that were affixed for domestic use or convenience. The same basis of reasoning supported the exception under either head. In 1822 it was indirectly held that set pots, ovens, and ranges erected upon the demised premises by the tenant were removable.³⁰ In 1825, *Bayley, J.*,³¹ expressly declared that stoves and grates fixed into the chimney places with brickwork by the tenant, and also a cupboard standing on the ground, supported by holdfasts, placed upon the demised premises by the tenant, were removable fixtures. Likewise, in 1830,³²

and therefore we agree with the learned judge in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste."

²⁹ In *Leach v. Thomas*, 7 Car. & P. 327, *Patteson, J.*, said: "With respect to the chimney piece, the only question is whether it was an ornamental chimney piece or not. It has been laid down by Lord Chief Justice Dallas that a tenant may remove ornamental chimney pieces which have been put up by him during the tenancy. Therefore, if you think that this was an ornamental chimney piece, the defendant had a right to remove it."

³⁰ *Winn v. Ingilby*, 5 Barn. & Ald. 625.

³¹ *Rex v. Inhabitants of St. Dunstan in Kent*, 4 Barn. & C. 686.

³² In *Grymes v. Boweren*, 6 Bing. 437, *Tindal, C. J.*, said: "The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant than

a pump fastened through a brick flooring with a well beneath, and attached to a stout upright plank, which rested on the ground at one end, and was fixed to the wall by an iron bolt or pin with a nut and screw on the other end, was held a removable fixture. And so, in 1841,³³ the doctrine was affirmed that kitchen ranges, stoves, coppers, and grates fixed upon demised premises by tenants at their own expense, and for their use and convenience, are removable fixtures.

§ 12. Reason for the exception in cases of ornamental and domestic fixtures.

Thus it appears that another exception, in addition to that in favor of trade fixtures, became engrafted upon the strict rule as to fixtures. The ground for the relaxation of the rule in respect to trade fixtures was that of public policy and public benefit. The exception in favor of ornamental and domestic fixtures rests upon a very different basis.³⁴

as between persons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney pieces, wainscots fastened with screws, coppers, and various other articles; and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the incoming to the outgoing tenant is confirmatory of this view of the question. Looking at the facts of this case,—considering that the article in dispute was one of domestic convenience, that it was slightly fixed, was erected by the tenant, could be moved entire, and that the question is between landlord and tenant,—I think the rule should be made absolute.”

³³ Darby v. Harris, 1 Q. B. 895.

³⁴ “ ‘Domestic fixtures’ have been defined by Mr. Gibbon to be ‘those articles which a tenant fixes in his dwelling house in order to render his occupation more comfortable or convenient,’ and have been divided by the same author into two classes,—tho-

The principle upon which this rule is founded appears to be that, inasmuch as the lessee must necessarily make certain annexations to the realty for ornament or domestic convenience, in order to beneficially enjoy the estate, therefore annexations of this character must be designed for temporary purposes only, and the adoption of any other rule considering such annexations as a part of the realty would work the greatest hardship to tenants, and no practical advantages to landlords.³⁵

which are useful and those which are ornamental. This definition, while correct in its terms so far as it extends, does not seem sufficiently comprehensive to include all the cases usually classed under this head; and the subject is usually understood to include annexations, other than trade or agricultural fixtures, made by a tenant to his dwelling house, or other demised premises, for the purpose of ornament, or to render his occupation of the premises more convenient."

See, also, Ewell, *Fixtures*, p. 127.

³⁵ "And the principle on which this rule is founded appears to be that, as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates if, by every slight attachment to the freehold, the property should immediately be changed, and pass over to the reversioner. Hence it is obvious that the tenant's right of removal in respect of this class of annexations depends upon very different grounds from those which prevail in the case of fixtures put up for trade and manufactures.

"But on recurring to the facts of the cases which have been cited, it appears that some of the articles held to be removable by a tenant are not matters of mere ornament and decoration. They consist, rather, of instruments and utensils fixed up for purposes of general utility or common domestic convenience. It is notorious, also, in practice, that a great variety of articles are considered to belong to the tenant, and as such are taken away or valued to the incoming tenant, which cannot be said to have been put up with a view to ornament; neither are they in any

§ 13. The exceptions to the rule considered.

As previously mentioned, the early cases in relation to trade fixtures seem to have based their determination upon a trade fixture, as such, from the purpose to which it was put, and not to have taken into consideration its nature, structure, and mode of annexation. This, perhaps, may be explained by the fact that the value of the early trade fixtures was such as to conclusively presume only an intention on the part of the tenant to annex temporarily. On the other hand, in case of ornamental and domestic fixtures, it is easily observable that most of the articles thereunder considered are, in themselves, of a personal nature, which afford to them their great protection in invoking the rule as to fixtures, and that their annexation to the freehold, in most cases, need be only slight in order to render their service most efficient. Hence, from early times, in considering this class of fixtures, the maintenance of their personal nature was important in order to grant the right of removal. The question arose whether they were intended *perpetui usus causa*, or *pur un profit del ènheritance*,—whether they became realty in their character or retained their personal characteristics. This was ascertained and determined from the nature and structure of the fixtures in question,³⁶ from the manner in which

manner connected with trade. Although, therefore, articles of this description are not strictly referable to the head of ornamental fixtures, yet it is now generally understood that they fall within the same principle, and may be removed by the tenant at the end of his term. Perhaps, in these cases, the personal nature of the property is the principal ground upon which it is protected. For it is observable that the species of annexations described in the decisions are utensils and machines which are perfect chattels in themselves, and are, for the most part, such as serve as substitutes for mere movable furniture." Amos & Ferard, *Fixtures*, pp. 63, 64.

³⁶ "But, besides the mode of annexation, it is to be observed

they were annexed,³⁷ from the effect of their removal upon the premises,³⁸ and from the intention to make a temporary

that there is a further circumstance to which the courts have had regard in the discussion of these questions, and which Mr. B. Graham considered to be a proper ground of decision in respect of ornamental fixtures; for, when the above-mentioned case of *Buckland v. Butterfield* was before that learned judge at nisi prius, he was of opinion that the pinery was not removable, because it might be deemed a permanent improvement. And Mr. J. Park explains the decision, on the same grounds, as resting on the fact that the building was deeply fixed in the soil, and formed part of the house to which it was attached. These opinions are also conformable to that expressed by Lord Kenyon in a previous case; for in *Dean v. Allaley* [3 Esp. 11] his lordship is reported to have said that, 'if a tenant will build, upon premises demised to him, a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord.' " *Amos & Ferard, Fixtures*, p. 67.

³⁷ "In one of Lord Hardwicke's decisions the right of removing the wainscot is stated with a qualification of its being fixed only with screws. In a subsequent case Lord Hardwicke states its removability without this qualification; but he says it is a very strong case. In *Elwes v. Maw* [3 East, 38], Lord Ellenborough, alluding to the same article, again introduces the mention of the screws; and this is repeated by Gibbs, C. J., in *Lee v. Risdon* [7 Taunt. 191], and again in the judgment of the court in *Buckland v. Butterfield* [2 Brod. & B. 54]. In the last-mentioned case, Dallas, C. J., says: 'There may be that sort of fixing or annexation which, though the building or thing annexed may have been solely for ornament, will yet make the removal of it waste;' and upon this ground, viz., that it was so annexed as to be permanently incorporated with the principal building, it was determined that the conservatory * * * could not be taken away. In like manner. in *Grymes v. Boweren* [6 Bing. 437], Tindal, C. J., among other circumstances, relies on the fact that the article was only slightly attached to the freehold.

"The instance put of chimney pieces is scarcely less strong than that of wainscot. Lord Hardwicke first introduced the mention of

annexation, or to substantially and permanently improve the premises by the fixtures. Thus it can be seen that the privilege of the tenant or lessee to remove fixtures of an ornamental or domestic nature is of a more limited nature than that in respect to trade fixtures.

§ 14. The exception to the rule not extended to agricultural fixtures.

These two exceptions, then, became fixed, and have remained to the present day, with various amplifications and modifications. The rule in respect to agricultural fixtures,

them, but he does not state under what circumstances their removal would be justifiable; and although his opinion in respect of this article has been followed in most of the judgments, yet, it may be presumed that, independently of their ornamental nature, the construction and method of annexation to the house could not have been altogether disregarded, else, as a general authority, it would seem to carry the tenant's right of removal very far indeed." Amos & Ferard, *Fixtures*, pp. 65, 66.

³⁸ "Lastly, it is proper to notice one additional topic, which was mentioned by Lord Mansfield as a ground for permitting the removal of ornamental fixtures, viz., that the premises are left in the same state in which the tenant finds them, and that there is no injury to the landlord. This principle does not appear to have been adverted to, or at least insisted on, in the other modern decisions, although in the old cases, where it was agreed that a lessee might take away furnaces, etc., fixed to the floor and not to the walls of a house, the reason assigned was that the house would not be impaired, and so no waste. Lord Mansfield, in making the remark alluded to, appears to apply it to trading, as well as to ornamental, erections; but certainly, in many of the trade cases, it would be impossible to say that no injury would accrue to the landlord or his estate by the act of removing the fixture, though perhaps it is true that there is no case hitherto decided in favor of the tenant where it appeared as a fact that any considerable damage was occasioned to the freehold." Amos & Ferard, *Fixtures*, pp. 67, 68.

(33)

as laid down in the leading case of *Elwes v. Maw*, has been generally followed up to the present day. The exceptions in the case of trade, ornamental, and domestic fixtures could not be extended to agricultural fixtures, for that would serve to deny the very existence of the common-law rule, of which the above are exceptions. But the apparent harshness of the rule as to agricultural fixtures has been greatly lessened at the present time, either by bringing the so-called "agricultural fixture" within the meaning of a trade or ornamental fixture, or by statutory enactment or judicial decision.³⁹ As said by Story, J., in *Van Ness v. Pacard*:⁴⁰ "The distinction is certainly a nice one between fixtures for the purpose of trade and fixtures for agricultural purposes, at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such beneficial enjoyment of the estate." Hence, since the line of demarcation between these fixtures is by no means clear, it has been easy for the courts to consider many agricultural fixtures as coming within the meaning of trade or ornamental fixtures, and so removable; so that now the strict operation of the old common-law rule is confined within narrow fields.

³⁹ "It was held in the celebrated case of *Elwes v. Maw* [3 East, 38] that the right of the tenant as to the removal of articles or structures attached to the land did not extend to those attached or erected by him for agricultural purposes. The decision in this case has been frequently criticised, and has, in England, been rendered somewhat less important by the passage of statutes extending the rights of agricultural tenants as to the removal of fixtures." 13 Am. & Eng. Enc. Law (2d Ed.) p. 646.

⁴⁰ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137.

§ 15. Intention as applied to the law of fixtures.

It may be stated that the primary test which is applied at the present day, in order to ascertain whether a fixture is removable or not, is the intention of the parties. This may be expressed, or it may be implied from the nature and character of the article annexed, the mode of annexation, the purpose and use to which the article is put, and the effect of its removal upon the freehold. It is interesting to note the development of this idea of intention in determining a fixture. Under the rule in its original conception, the intention of the parties was no factor. A thing annexed to the freehold became absolutely, *ipso facto*, a part and parcel thereof, no matter what was the intention of the parties. But under the exception first made in respect to trade fixtures, the intention of the party when making the annexation was really the basis of his right in being permitted, at the end of his term, to remove the fixture. This intent was shown from the purpose of the annexation. The annexation was made to assist him in carrying on his trade operations, not to improve the freehold. Likewise, when a subsequent exception was made in favor of ornamental and domestic fixtures, the intention of the parties was equally the basis of the right established. But here, not the purpose of the annexation showed the interest; rather the nature and character of the thing itself, together with its mode of annexation, and the effect of its removal. The intention of the parties, then, being the real test of the rights established under the exceptions, it follows, therefore, that the exceptions simply differ among themselves in the mode of ascertaining this intent; and since the exceptions mentioned are so broad in their scope as to include often within their boundaries fixtures that

might properly be termed "agricultural fixtures," so as to considerably lessen the application of the common-law rule, therefore it can be readily seen that the extension of the test of intention to all fixtures would necessarily be the next progressive step in abrogating the old common-law rule. Such is the present tendency of the courts. This is shown by cases where chattels, in themselves personal, have been regarded as realty, such as fence rails lying loose on the ground,⁴¹ hop poles piled in a heap,⁴² a portable grist mill,⁴³ cotton presses.⁴⁴

§ 16. Conclusion.

In evolving the general history of the term "fixtures" as shown by the growth and development of the exceptions discussed, no attempt has been made to show the variant distinctions existing in respect to the application of the rules between the different classes or sets of persons, such as landlord and tenant, heir and executor, vendor and vendee, life tenant and remainderman, etc. Subsequent chapters will consider these distinctions particularly.

⁴¹ *Goodrich v. Jones*, 2 Hill (N. Y.) 142.

⁴² *Bishop v. Bishop*, 11 N. Y. 123.

⁴³ *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485.

⁴⁴ *Tate v. Blackburne*, 48 Miss. 1; *Bond v. Coke*, 71 N. C. 97; *Jones v. Bull*, 85 Tex. 136.

CHAPTER III.

REQUISITES AND TESTS OF A FIXTURE.

- § 17. As to the nature of the chattel or thing itself.
- 18. As to the annexation.
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 - (b) Annexation by force of gravity.
 - (c) Constructive annexation.
 - (1) Deer, pigeons, etc., in a park.
 - (2) Keys of a house, etc.
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 - (4) Miscellaneous instances.
 - (5) Chattels temporarily severed.
 - (6) Articles recently brought upon the realty.
 - (d) Injury by removal—In general.
 - (1) Present importance.
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 - (g) The manner of annexation—How far conclusive.
- 19. Adaptation to the use of the freehold.
- 20. Purpose to which the chattel is put.
 - (a) As applied to machinery.
 - (b) Distinction between machinery accessory to the business and machinery accessory to the realty.
- 21. Intention—Its importance.
 - (a) What meant by.
 - (b) How ascertained.
 - (c) Whose intention.
 - (d) How far conclusive.

§ 17. As to the nature of the chattel or thing itself.

Taking the word “fixture” as representing anything an-

nexed to the realty, the question is pertinent, what constitutes a "thing" in the sense used in the definition? Is everything annexed to the freehold to be considered a fixture?¹

There are three ways in which a thing may become annexed to another thing or to the realty: First. There may be such an annexation of the thing to the freehold that it thereby loses its identity as a separate thing, its individual existence being completely merged into that of the realty. Such is the case where soil, ground, or manure is added to the freehold, or where lumber is used in the construction of a house, or where one piece of iron is welded to another

¹ "The question then is, when does an originally separate and movable thing become part and parcel of a fixed and immovable thing? There are two ways in which one thing may become part of another thing, or part with some other thing of a common whole. The first is by mere physical conjunction or annexation, and this may take place in various modes. Thus, there may be such a conjunction or adjunction as either to unite the substances or to confuse and render indiscriminate the limits of the two, as where, by gradual and insensible addition, a stream adds to land earth washed down from another portion of the banks, or where two quantities, whether of solid or of liquid, are indistinguishably mixed, or where one piece of metal is welded into another; but also, without an actual union of substances or confusion of boundaries, one thing may be so firmly attached to another that a considerable degree of force or art is required to separate them, as where one thing is cemented to another, or is jointed into it, or is driven forcibly into it in such a manner that the two cohere. Under this head of physical conjunction, it is with respect to the latter mode of annexation and things so annexed that the question of fixture arises. But, secondly, one thing may be part of another with respect to its mode of use; and in this view, the most decisive test of whether a thing is to be considered as a thing by itself, or as a part of a whole, is whether it can exist by itself as a single thing." 4 Alb. Law J. 255.

piece, already part of the real estate. Second. A thing may be so constructed for, and so annexed to, the freehold, as thereby not to lose its separate tangible existence; yet, with the freehold, it so constitutes a complete whole, the interdependence of whose parts is essential for its unity, that it is regarded as a part of the freehold.² Such are

2 "If things, then, have been thus constructed to form parts of one whole, and have been actually appropriated to one another, then the two form one thing, and, though separated, they continue to form one thing, so long as the separation is designed to be only temporary, and not permanent. Which of the two (if either) is to be considered as principal and which accessory will depend upon their relative magnitude and importance.

"But although completeness of structure is the most decisive test of individuality, yet a thing, complete in itself, may be so far exclusively destined for use in conjunction with another that in a wide sense it may be regarded as a part of that other thing. And here it is to be observed that some things used in a particular place are of a kind used in all such places, or in most, but are commonly in the instance adapted to the peculiarities of the place; while other things are in themselves singular, rare, unusual, and are not adapted to or made to fit the place, but rather have the place adapted to them. Thus, such things as ovens, coppers, baths, etc., are of common household use, but are in the particular house commonly, if of any considerable size or bulk, adapted to use with reference to its size and arrangement; but paintings and ornaments are more singular, characteristic, and peculiar, and, in proportion to their singularity and to their rarity and value, have rather the place made subordinate to them, than are themselves made subordinate to the place. Now, to allow one thing to be claimed as part of another merely by virtue of such a supposed exclusive destination as has been spoken of above would introduce an extremely arbitrary and uncertain mode of reasoning. But since not every material annexation is reckoned sufficient in itself conclusively to make a movable chattel into a fixture, it often becomes necessary to consider with what design or view the annexation has been made. A material union being established sufficient to ground

locks, keys, bolts, bars, and marble pieces about a house; likewise bolts, nuts, and parts of a fixed machine or machinery. Third. A thing may be so annexed to the freehold as to still retain its individual character and separate existence as a thing, and so to be severable without material injury to the premises, or without destruction of the unity of the whole to which it was annexed. It is under this last head that the term "fixture" properly applies,—a thing annexed to the soil must retain its individuality as such in order to be classed as a fixture; that is, the question is whether it exists when separate, not merely as a raw material out of which other things can be framed, or which can be applied to human uses by some conversion of the form, or by the addition of something else, but whether it is of such a kind that, in that very character and description which it bears, and by which it is known and classified, it has an independent end and purpose of its own. If, by the annexation, the thing is assimilated into the whole, or serves to form a part of the whole, in either case its legal existence as a separate thing ceases, and it becomes part and parcel of that to which it is conjoined. So, where soil and manure are applied to land, brick and mortar in chimney making, lumber in house building, etc., the term "fixture" does not ordinarily apply.

Then, again, the term "thing," as used in the definition of a fixture, is ordinarily not predicable of anything which

the character of a fixture, but not wholly to determine it, the character of the thing fixed is an element in determining whether it ought or ought not to be so regarded." 4 Alb. Law J. 255.

See *Swoop v. St. Martin* (La.; 1903) 34 So. 426.

is not susceptible of physical annexation.³ This naturally includes incorporeal hereditaments. The above doctrine is illustrated by the case of *Woodward v. Lazar*,⁴ where the name, "What Cheer House," used by the tenant to designate a leased hotel, was held not to be capable of being a fixture, and hence did not entitle the landlord, upon surrender of the premises by the tenant, to a continued use of that name; but the name was a trade-mark, to the use of which the tenant had an exclusive right. To this rule, however, there are certain exceptions which immemorial usage has considered in the nature of fixtures, on the ground that they are necessary to the completeness of the realty, and therefore must pass with a conveyance of the same. Such are characters, heirlooms, crown jewels, deer, fish, swans, hawks, hounds, coats of arms, etc.⁵

§ 18. As to the annexation—(a) Physical annexation.

Having considered the nature and character of the thing required to constitute a fixture, we must next consider what annexation is sufficient to constitute a fixture. The old rule of the law of fixtures in regard to annexation was that the chattel should be let into or united to the land, or to some

³ Ewell, *Fixtures*, p. 8.

⁴ *Woodward v. Lazar*, 21 Cal. 449. A tenant, by giving a particular name to a building as his business sign for a hotel, for which he uses it, does not thereby make the name a fixture of the building, and the property of the landlord upon the expiration of the lease. But see the famous signboard case, where a hotel sign, with the picture of an oak tree and horsemen riding underneath, was regarded as a fixture of the tavern, the signboard itself being the thing in issue. *Ex parte Sheen*, 24 Alb. Law J. 202.

⁵ *Amos & Ferard*, *Fixtures*, pp. 153-162.

substance which was a part thereof. It was not enough to lay the chattel upon the land. Something more than mere juxtaposition was required. The soil must have been displaced for the purpose of receiving the article, or the chattel must have been fastened or attached to that which was already a part of the realty. Actual physical annexation was the essentially constituent requisite of a fixture.⁶ This rule is too narrow,⁷ and is not strictly followed at the present day, although it is generally conceded that physical annexation of the chattel to the realty is necessary in order to constitute it a fixture.⁸

⁶ Amos & Ferard, Fixtures, c. 1, p. 2.

⁷ Ewell, Fixtures, p. 25.

⁸ England: Beaufort v. Bates, 3 De Gex, F. & J. 381; Longbottom v. Berry, L. R. 5 Q. B. 123; Holland v. Hodgson, L. R. 7 C. P. 334; Wansbrough v. Maton, 4 Adol. & E. 884; Horn v. Baker, 9 East, 215; Rex v. Inhabitants of Otley, 1 Barn. & Adol. 161; Stead v. Gamble (1806) 7 East, 325; Hedge's Case (1779) 1 Leach, C. C. 240; Anthony v. Haneys (1832) 8 Bing. 186; Naylor v. Collinge (1807) 1 Taunt. 19; Turner v. Cameron (1870) L. R. 5 Q. B. 306.

Alabama: Thweat v. Stamps, 67 Ala. 96; Tillman v. De Lacy, 80 Ala. 103; Rogers v. Prattville Mfg. Co., No. 1, 81 Ala. 483; Bank of Opelika v. Kiser, 119 Ala. 194.

Arkansas: Choate v. Kimball, 56 Ark. 55; Bemis v. First Nat. Bank, 63 Ark. 625.

California: Merritt v. Judd, 14 Cal. 60; Pennybecker v. McDougal, 48 Cal. 160.

Connecticut: Swift v. Thompson, 9 Conn. 63; Baldwin v. Breed, 16 Conn. 60; Capen v. Peckham, 35 Conn. 88; Stockwell v. Campbell, 39 Conn. 364.

Illinois: Cook v. Whiting (1855) 16 Ill. 480; Hacker v. Munroe (1898) 176 Ill. 384.

Indiana: Binkley v. Forkner, 117 Ind. 176.

Iowa: Congregational Soc. of Dubuque v. Fleming, 11 Iowa, 533.

Kansas: Eaves v. Estes (1872) 10 Kan. 314.

Maryland: Kirwan v. Latour, 1 Har. & J. 289.

Just what is comprehended within the scope of the term "physical annexation" is a matter somewhat involved. Inasmuch as fixtures are determined differently between differ-

Massachusetts: *Gale v. Ward*, 14 Mass. 352, 7 Am. Dec. 223; *Hubbell v. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446.

Minnesota: *Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works*, 35 Minn. 543, 29 N. W. 349; *Wolford v. Baxter*, 33 Minn. 18, 21 N. W. 744; *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221.

Missouri: *Donnewald v. Turner Real-Estate Co.*, 44 Mo. App. 350.

Nevada: *Brown v. Lillie*, 6 Nev. 244.

New Hampshire: *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Lathrop v. Blake*, 23 N. H. 66.

New Jersey: *Potts v. New Jersey Arms & Ordnance Co.*, 17 N. J. Eq. 395; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Blancke v. Rogers*, 26 N. J. Eq. 563; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 329; *Speiden v. Parker*, 46 N. J. Eq. 292; *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; *Quinby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. 260; *Brearley v. Cox*, 24 N. J. Law, 289; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460; *Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140; *Temple Co. v. Penn Mut. Life Ins. Co.* (N. J. Law; 1903) 54 Atl. 295.

New York: *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Voorhees v. McGinnis*, 48 N. Y. 278; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Hart v. Sheldon*, 34 Hun, 38; *Scobell v. Block*, 82 Hun, 223; *Laffin v. Griffiths*, 35 Barb. 58; *Vanderpoel v. Van Allen*, 10 Barb. 157; *Stevens v. Buffalo & N. Y. City R. Co.*, 31 Barb. 590; *Tabor v. Robinson*, 36 Barb. 484; *Beardsley v. Ontario Bank*, 31 Barb. 679; *Miller v. Plumb*, 6 Cow. 665, 16 Am. Dec. 456; *Raymond v. White*, 7 Cow. 319.

Ohio: *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

Oregon: *Helm v. Gilroy*, 20 Or. 517.

South Carolina: *McClintock v. Graham*, 3 McCord, 553.

Texas: *Cole v. Roach*, 37 Tex. 413; *Hutchins v. Masterson*, 46

ent classes of persons, and since the mode of annexation of a chattel does not fix conclusively its character as a fixture, but is rather only one out of many considerations by which

Tex. 551, 26 Am. Rep. 286; Keating Implement & Machine Co. v. Marshall Electric Light & Power Co., 74 Tex. 605; Gulf, C. & S. F. Ry. Co. v. Dunman, 85 Tex. 176.

Vermont: Hill v. Wentworth, 28 Vt. 428; Sweetzer v. Jones, 35 Vt. 317.

Virginia: Green v. Phillips, 26 Grat. 752, 21 Am. Rep. 323.

Wisconsin: Taylor v. Collins, 51 Wis. 123; Walker v. Grand Rapids Flouring Mill Co., 70 Wis. 92.

The leading case in this country on the rule above stated is that of Walker v. Sherman, 20 Wend. (N. Y.) 636, in which Cowen, J., says: "The ancient distinction, however, between actual annexation and total disconnection, is the most certain and practical, and should therefore be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dane and of the learned judge in Farrar v. Stackpole, 6 Me. 1541, while it cannot be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures from the moral adaptation of what is in fact a mere movable, to the carrying on of a farm or factory, etc., however essential the movable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures without utterly confounding the rule by which the rights of the heir or the purchaser have been long governed. * * * On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm, or lot, etc., * * * nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not pre-

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its character is determined, it happens that the courts, in giving credence to the rule, have had to stretch the scope of that rule far beyond the logical meaning of the term "phys-

pared to deny that a machine movable in itself would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detached and restored to its ordinary place as easily as the chain in *Farrar v. Stackpole*. I think it would be a fixture, notwithstanding. But I am unable to discover, from the papers before us, that any of the machines in question before the commissioners were even slightly connected with the freehold. For aught I can learn, they were all worked by horses or by hand, having no more respect to any particular part of the building or its water wheel than the ordinary movable tools of such an establishment. These would have their common place and be essential to its business. So, a threshing machine and other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily or commonly attached, even by bands or hooks, to any part of the realty. The word 'fixtures' is derived from the things signified by it being fastened or fixed. * * * The general importance of the rule, however, which goes upon corporeal annexation, is so great that more evil will result from frittering it away by exceptions than can arise from the hardship of adhering to it in particular cases."

And so, in *Wolford v. Baxter*, 33 Minn. 17, 21 N. W. 744, Mitchell, J., said: "While not agreeing as to the necessity for, or the degree of importance to be attached to, the fact of actual physical annexation, yet the authorities generally unite in holding that, to constitute a fixture, the thing must be of an accessory character, and must be in some way in actual or constructive union with the principal subject, and not merely brought upon it. * * * But while physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the freehold for any purpose. To make it a **fixture**, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or, at least,

ical annexation.”⁹ In fact, many modern cases,¹⁰ and especially the Pennsylvania cases,¹¹ have denied the necessity of physical annexation as an essential ingredient necessary to constitute a chattel a fixture. The only effect, apparently, given by these cases to physical annexation, is, as a matter of evidence, to show the intention of the parties.¹² It seems

it must be mechanically fitted, so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine, which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete.”

⁹ See the leading case of *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

¹⁰ *Farrar v. Stackpole*, 6 Me. 154; *Hill v. Mundy* (1889) 89 Ky. 36, 4 L. R. A. 674; *Snedeker v. Warring*, 12 N. Y. 170; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809.

¹¹ *Meigs' Appeal*, 62 Pa. 28, 1 Am. Rep. 372; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; *Christian v. Dripps*, 28 Pa. 271.

In *Ege v. Kille*, 84 Pa. 340, *Mercur, J.*, said: “The criterion of a fixture depends on the business for which the premises are used. A fixture in a manufactory, mill, or colliery may have no adaptation to many other kinds of business. Although not attached, yet if it be designed for the convenience of trade on the premises, and be so used, or subject to be called into use at any time, it becomes a fixture. If the article is indispensable in carrying on the specific business, it becomes a part of the realty.” In this case the conveyance of an ore bank carried with it all the machinery, whether attached or not, situated upon the premises, and necessary for the carrying on of the specific business.

In *Morris' Appeal*, 88 Pa. 383, *Mercur, J.*, again said: “Physical annexation to realty is not necessary to convert a chattel into a fixture. Whether it be such depends much on the business for which the premises are used. Articles necessary or convenient in the transaction of one kind of business would be useless in another. If the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a part of the realty.”

¹² *Hawes v. Lathrop*, 38 Cal. 493; *Stockwell v. Campbell*, 39 Conn.

evident that this is the tendency of the late cases that recognize the rule, as may be noted from the large class of fixtures that come under the head of "constructive annexation."¹³ It is certain, however, using the broad definition of the term "fixtures,"¹⁴ that things fastened to the realty by displacing the soil for the purpose of receiving them,¹⁵ or by driving them into the soil,¹⁶ or by cementing the thing to the freehold,¹⁷ or by means of screws, bolts, nails, or other connecting instrumentalities,¹⁸ are fixtures, in so far as they fulfill the requisite of annexation.

363, 12 Am. Rep. 393; *Goff v. O'Conner*, 16 Ill. 421; *Dutton v. Ensley*, 21 Ind. App. 48, 51 N. E. 381; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471; *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 361; *Hill v. Mundy* (1889) 89 Ky. 36, 4 L. R. A. 674; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *State Sav. Bank v. Kercheval*, 65 Mo. 687; *Davis v. Mugan*, 56 Mo. App. 311; *Langdon v. Buchanan*, 62 N. H. 657; *Feder v. Van Winkle*, 53 N. J. Eq. 370; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 495; *Latham v. Blakely*, 70 N. C. 368; *Doscher v. Blackiston*, 7 Or. 143; *Chase v. Tacoma Box Co.*, 11 Wash. 377; *Strickland v. Parker*, 54 Me. 263; *Parsons v. Copeland*, 38 Me. 537; *Green v. Phillips*, 26 Grat. (Va.) 752; *Thomas v. Davis*, 76 Mo. 72.

¹³ See post, § 18c, "Constructive Annexation," and cases cited thereunder.

¹⁴ In many of the cases, perhaps in the majority, the courts use the term "fixtures" in the sense of irremovable fixtures. In ascertaining whether a chattel annexed is removable or not, it is not material whether we adopt the broader definition or the narrower one; but in deducing general principles applicable to the law of fixtures is it well to bear in mind the scope of the term.

¹⁵ *Horn v. Baker* (1808) 9 East, 215.

¹⁶ *Snedeker v. Warring*, 12 N. Y. 170.

¹⁷ *Folger v. Kenner*, 24 La. Ann. 436; *Mackie v. Smith*, 5 La. Ann. 717. See *Snedeker v. Warring*, 12 N. Y. 170.

¹⁸ *Elwes v. Maw*, 3 East, 38; *Farrar v. Stackpole*, 6 Me. 154.

— (b) **Annexation by force of gravity.**

Whether the force of gravity alone furnished a sufficient annexation for certain chattels, so as to constitute them fixtures, without any other fastening to the freehold, was formerly a mooted question. The earlier English cases generally held the force of gravity to afford an insufficient annexation,¹⁹ and this holding has been followed to some extent by American decisions.²⁰ Yet the later cases, in accordance with, perhaps, the better rule, consider the force of gravity a sufficient annexation for those chattels whose permanence to the realty is as effectively accomplished through their weight as if they were fastened to the freehold. Thus, buildings have been frequently held to be a part of the realty, though merely resting upon a foundation of timbers, blocks, or stones;²¹ likewise, heavy machinery, such as en-

¹⁹ *Rex v. Inhabitants of Otley*, 1 Barn. & Adol. 161; *Horn v. Baker*, 9 East, 215; *Mansbrough v. Maton*, 4 Adol. & E. 884; *Rex v. Inhabitants of Londonthorpe*, 6 Term R. 377; *Wiltshier v. Cottrell*, 1 El. & Bl. 674; *Chidley v. Churchwardens of West Ham*, 32 Law T. (N. S.) 486; *Keefer v. Merrill*, 6 Ont. App. 121.

²⁰ *Titus v. Mabree*, 25 Ill. 257; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Park v. Baker*, 7 Allen (Mass.) 78, 83 Am. Dec. 668.

²¹ *Bunnell v. Tupper*, 10 U. C. Q. B. 414; *Doran v. Willard*, 14 New Bruns. 358; *Fowler v. Fowler*, 15 New Bruns. 488.

A barn erected on stone piers resting on the ground held to be a fixture. *Hinman, C. J.*, said: "We are aware that in England, by some, if not by most, of their cases, where wooden buildings are erected on brick or stone foundations, and are not let into or fastened to the brick or stone work, and are only held to their places by their own weight, they have been held to be personal property only. * * * But this has never been considered as the law with us, and to hold it to be so at this day would in effect change the character of very many, if not of most, of the wooden buildings in (48)

gines, boilers, etc., has been held sufficiently annexed by the force of gravity alone;²² so, a millstone, resting upon the ironwork fixed to the top of the perpendicular shaft which

the state, from real estate into mere personal chattels." *Landon v. Platt*, 34 Conn. 517.

A house erected upon blocks lying upon the ground, a fixture. *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332.

House set on blocks as a foundation. *Dutton v. Ensley*, 21 Ind. App. 46.

A wooden ice house resting upon a wooden block under each corner of the sills, which blocks are slightly let into the ground, is a fixture. *Antoni v. Belknap*, 102 Mass. 193.

A barn resting partly upon the ground, partly upon large stones, a fixture. *Westgate v. Wixon*, 128 Mass. 304.

House merely resting upon the ground, a fixture. *Freeman v. Lynch*, 8 Neb. 200.

Building merely placed upon blocks, a fixture. *Doscher v. Blaciston*, 7 Or. 143.

A wooden building resting only upon the surface, and not let into the soil, a fixture. *Huebschmann v. McHenry*, 29 Wis. 655.

A wooden dancing hall, resting partly on the ground, and partly on posts set in the ground, a fixture. *Lipsky v. Borgmann*, 52 Wis. 256, 38 Am. Rep. 735.

Contra, a saw mill built upon timbers lying upon the ground is held a mere personal chattel. Actual physical annexation is required by this court. *Brown v. Lillie*, 6 Nev. 244.

²² *Haggert v. Town of Brampton*, 28 Can. Sup. Ct. R. 174; *Dickson v. Hunter*, 29 Grant's Ch. (U. C.) 73; *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249. A lathe weighing three tons, and not fastened, a fixture. *Green v. Chicago, R. I. & P. R. Co.*, 8 Kan. App. 611, 56 Pac. 136. So, an iron table weighing thirty-three tons. *Smith Paper Co. v. Servin*, 130 Mass. 511; *Smith v. Blake*, 96 Mich. 542; *Wolford v. Baxter*, 33 Minn. 19, 53 Am. Rep. 1, 21 N. W. 744; *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221; *Cavis v. Beckford*, 62 N. H. 229; *Deal v. Palmer*, 72 N. C. 582. An engine and boiler, resting on wheels six inches in diameter, a fixture. *Hart v. Sheldon*, 34 Hun (N. Y.) 39.

turns it, and kept there by the force of gravity;²³ so, statuary put in place for purposes of ornament, but not actually fastened;²⁴ likewise, a bell suspended in a frame;²⁵ and,

²³ *Langdon v. Buchanan*, 62 N. H. 657.

²⁴ *Snedeker v. Warring*, 12 N. Y. 170. This is a celebrated case, wherein the doctrine of fixtures from the standpoint of annexation is elaborately discussed. The suit arose over a colossal statue of Washington, weighing, with its pedestal, cut from the same block of stone, about three tons, which the sculptor owner had placed in the grounds in front of his house. Its base, three feet high, rested upon a permanent artificial mound, raised for that purpose. The statue was not fastened to the base, nor the base to the foundation upon which it rested. Parker, J., in his opinion, said: "No case has been found, in either the English or American courts, deciding in what cases statuary placed in a house or in grounds shall be deemed real, and in what cases personal, property; * * * nor will it be controverted that where statuary is placed upon a building, or so connected with it as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this statue; it being placed in a courtyard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar; and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

"If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty; but as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even

²⁵ *Weston v. Weston*, 102 Mass. 514; *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86.

so, fences resting on the surface of the ground,²⁶ and planks in a gin house, lying loose upon upper rafters;²⁷ so, in some

less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

"By the civil law, columns, figures, and statues used to spout water at fountains, were regarded as immovable or real, * * * though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments. * * * But Labeo held the rule to be, 'Ea quae perpetui usus causa in aedificiis sunt, aedificii esse; quae vero ad praesens, non esse aedificii,' thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary, or, as it was generally called by civilians, 'its destination.' * * *

"And Pothier says that when, in the construction of a large vestibule or hall, niches are made, the statues attached to those niches make part of the house, for they are placed there *ad integrandam domum*. They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be anything in the vestibule without the statues; and he says it is of such statutes that we must understand what Papinianus says: 'Sig-

²⁶ Mitchell v. Billingsley, 17 Ala. 393; Smith v. Carroll, 4 G. Greene (Iowa) 146; Boon v. Orr, 4 G. Greene (Iowa) 304; Emrich v. Ireland, 55 Miss. 390; Sawyer v. Twiss, 26 N. H. 345; Glidden v. Bennett, 43 N. H. 306; Wentz v. Fincher, 12 Ired. (34 N. C.) 297, 55 Am. Dec. 416; State v. Graves, 74 N. C. 396; Kimball v. Adams, 52 Wis. 554.

²⁷ Bryan v. Lawrence, 50 N. C. (5 Jones) 337.

cases, the rolling stock of a railroad has been held to be a part of the realty,²⁸ though perhaps the contrary decisions assert the better rule.²⁹

illa et statuæ affixæ, instrumento domus non continentur, sed domus portio sunt. * * *

"By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. * * * But statues standing on pedestals in houses, courtyards, and gardens retain their character of 'movable' or personal. * * * This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them; for when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable. * * * The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work [2 Repertoire Generale, Journal du Palais, by Leditur Rollin], where the rule is laid down with regard to such ornaments as mirrors, pictures, and statues, that the law will presume the proprietor intended them as immovable, when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base on which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap, a foundation and base no longer appropriate or useful. * * * Things immovable by destination are said to be those objects movable in their nature, which, without being actually held

²⁸ *Palmer v. Forbes*, 23 Ill. 302; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabey*, 25 Ill. 257; *Titus v. Ginheimer*, 27 Ill. 462; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484.

²⁹ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Stevens v. Buffalo & N. Y. C. R. Co.*, 31 Barb. (N. Y.) 590; *Bement v. Plattsburgh & M. R. Co.*, 47 Barb. (N. Y.) 104; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 330.

The logic of this subject is well considered in the case of *Holland v. Hodgson*,³⁰ in which Blackburn J., says: "There

to the ground, are destined to remain there perpetually attached for use, improvement, or ornament. * * *

"I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place under such circumstances would produce as great an injury, and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity. * * *

"There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer house of wicker work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would placed on the house, or as one of two statues placed on the gate posts at the entrance to the grounds. An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

"It is said the statues and sphinxes of colossal size which adorn the avenue leading to the temple of Karnak, at Thebes, are secured on their solid foundation only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for four thousand years; * * * and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered

³⁰ *Holland v. Hodgson* (1872) L. R. 7 C. P. 328.

is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation, and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; * * * but, even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land. * * * Thus, blocks of stone placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land, though the same stones, if deposited in a builder's yard, and, for the sake of convenience, stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become

personal assets of the Ptolemies, after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means. I apprehend the question whether the pyramids of Egypt or Cleopatra's needle are real or personal property does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers or sealing wax or a handful of cement. It seems to me puerile to make the title to depend upon the use of such or of any other adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence."

part of the land. The anchor of a ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel. * * * This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the *onus*. In some cases, such as the anchor of a ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land."

— (c) Constructive annexation.

Though the general rule applicable to fixtures requires actual physical annexation of the chattel in order to constitute it a fixture, yet there are a class of articles which

are held to be fixtures, on the ground that they are constructively annexed. It appears that, in order to constitute a constructive annexation to the realty, the article in question, though not physically connected therewith, must not only be appropriated and adapted, and accessory to the fit and beneficial use of the principal thing—the realty—and not to a matter of mere personal nature, but must also be such as goes to complete the building, machinery, etc., constituting the principal thing which is affixed to the land, and must be such as, if removed, would leave the principal thing incomplete and unfit for use, and would not, itself alone, be equally useful and adapted for general use elsewhere. In respect to all cases of constructive annexation there exists both adaptation to the enjoyment of the land and localization in use, as obvious elements of distinction from mere chattels personal.³¹

—— (1) Deer, pigeons, etc., in a park.

Thus, deer in a park, fish in a pond, pigeons, conies, pheasants and partridges, wild bees, and other animals *ferae naturae* have been held to be constructively annexed and to pass with the realty;³² some cases, however, consider the doctrine of fixtures entirely inapplicable to the above-mentioned animals, on the ground that they are more in the nature of heirlooms, and hence go with the inheritance for special and peculiar reasons;³³ yet they were, at common

³¹ Ewell, Fixtures, p. 34; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 323.

³² Ewell, Fixtures, p. 241.

³³ In *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 330, Depue, J., in speaking of "constructive annexation," said: "The (56)

law, so much a part of the inheritance that waste could be committed in respect to them.³⁴ The reason for the rule seems to be that animals *ferae naturae*, being not the subject of absolute property, of course could not pass to a personal representative as chattels, and passed with the freehold, not by reason of the right of property in them, but *ratione soli aut ratione privilegii*.³⁵ So in all the above cases, where the animals, insects, etc., have been tamed and reclaimed, they are personal property.³⁶

illustrations of doves in a cote, deer in a park, and fishes in a pond are entirely inapplicable to the present subject. They go with the inheritance for special and peculiar reasons. In *Amos & Ferard on Fixtures*, they are classified under the head of heirlooms,—a class of property entirely distinct from fixtures. * * * Sir Edward Coke assigns them to go with the inheritance, because they are animals *ferae naturae*, ‘and could not be gotten without industry, as by nets and other engines.’ *Co. Litt.* 8a. This is the true foundation of the common-law rule, for *Wentworth* saith that ‘young pigeons, being in the dove house, not able to fly out, go to the executor; yet their dams, the old ones, shall go to the heir with the dove house.’ *Went. Off. Ex.* 143. And fishes confined in a trunk or the like go to the executor. *Co. Litt.* 8a. In *Parlet v. Cray*, fishes in a pond were adjudged to belong to the heir, for the reason that ‘they are as profits of the freehold, which the executor shall not have, but the heir or he who hath the water.’ *Cro. Eliz.* 372. No analogy exists between these animals and machinery, such as engines and cars, by which the legal status of the one can be deduced from that of the other.”

So, in *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 323, *Johnson, C.*, said: “Deer in a park, rabbits in a warren, doves in a dovecote, and fish in a pond depend on a different reason. In these conditions they are reckoned not property at all; but any of them caught and secured becomes at once personal property.”

³⁴ *Ewell, Fixtures*, p. 244.

³⁵ *Ewell, Fixtures*, p. 242.

³⁶ *Amos & Ferard, Fixtures*, 200; *Morgan v. Earl of Abergavenny*, 8 C. B. 768.

— (2) Keys of a house, etc.

The term “constructive annexation” has been also applied to the keys³⁷ of a house, which must be movable to answer their purpose; to doors, sashes, and window frames;³⁸ and to parts and pieces of machinery which are annexed to the freehold.³⁹ In the case of machinery, the rule asserted is that, where the principal becomes a fixture by actual annexation to the soil, such part of it as may be not so physically annexed, but which, if removed, would leave the principal thing unfit for use, and would not of itself, and standing alone, be well adapted for general use elsewhere, is

³⁷ *Liford's Case*, 11 Coke, 50b; *Bishop v. Elliott*, 11 Exch. 113; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 331.

³⁸ *Wystow's Case*, Y. B. 14 Hen. VIII. 25b, cited in *Liford's Case*, 11 Coke, 50b; *Hill v. Wentworth*, 28 Vt. 436; *State v. Elliot*, 11 N. H. 540; *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

³⁹ *Sheffield & S. Y. Permanent Benefit Bldg. Soc. v. Harrison*, 15 Q. B. Div. 358; *Fisher v. Dixon*, 12 Clark & F. 312; *Longbottom v. Berry*, L. R. 5 Q. B. 133; *Mather v. Fraser*, 2 Kay & J. 536, 2 Jur. (N. S.) 900; *Haggert v. Town of Brampton*, 28 Can. Sup. Ct. R. 174; *Gooderham v. Denholm*, 18 U. C. Q. B. 203; *Metropolitan Counties, etc., Soc. v. Brown*, 26 Beav. 454; *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 214.

Detachable wheels belonging to a polishing machine were held to partake of the character of the machine. *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310.

Loom beams laid upon the looms when in use held to possess the character of the looms. *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235.

Crates, capping machines, and work tables not actually annexed, but essentially necessary to the principal machinery in a canning factory, pass as fixtures by constructive annexation. *Dudley v. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368.

considered constructively annexed.⁴⁰ This rule has been held to include the duplicate parts of a machine.⁴¹

— (3) Rolling stock of railroad.

The rolling stock of a railroad has been, at times, held to be constructively annexed to and to pass with the realty,⁴² although the contrary view seems to be upheld by the numerical and logical weight of authority.⁴³ In the former class of cases, the reason for holding the rolling stock a fixture is on the ground of adaptation to use with, and of being essential to, the beneficial enjoyment of the real estate. In this connection, in *Farmers' Loan & Trust*

⁴⁰ *Beardsley v. Ontario Bank* (1859) 31 Barb. (N. Y.) 619; *Burnside v. Twitchell* (1861) 43 N. H. 390; *Dudley v. Hurst*, 67 Md. 44.

⁴¹ Duplicate sets of rolls belonging to a rolling machine, and essential to make a perfect and complete machine, fixtures. *Ex parte Astbury*, 4 Ch. App. 630.

So, in *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490, and in *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517, but rather upon the theory that such rolls were essential parts of the iron mill than of the particular machine.

Likewise, a duplicate cylinder for a bluing machine, and duplicate pulleys for grindstones, fixtures. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452.

⁴² *Scott v. Clinton S. R. Co.*, 6 Biss. 529, Fed. Cas. No. 12,527; *La Crosse & M. R. Co. v. James*, 6 Wall. 750; *Palmer v. Forbes*, 23 Ill. 302; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabee*, 25 Ill. 257; *Titus v. Ginheimer*, 27 Ill. 462; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Pennock v. Coe*, 23 How. (U. S.) 117; *Gue v. Tidewater Canal Co.*, 24 How. (U. S.) 257.

⁴³ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Stevens v. Buffalo & N. Y. C. R. Co.*, 31 Barb. (N. Y.) 590; *Bement v. Plattsburgh, & M. R. Co.*, 47 Barb. (N. Y.) 104; *Coe v. Columbus, P. & I. R. Co.*, 10

Co. v. Hendrickson,⁴⁴ Strong, P. J., said: "That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there

Ohio St. 372; *Randall v. Elwell*, 52 N. Y. 521; *Chicago & N. W. Ry. Co. v. Borough of Fort Howard*, 21 Wis. 45; *Neilson v. Iowa Eastern R. Co.*, 51 Iowa, 184.

In *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. Law, 21, it was said: "Engines and cars are no more appendages of a railroad than are wagons and carriages appendages of a highway. Both are equally essential to the enjoyment of the road."

In *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 330, Depue, J., spoke as follows: "The criterion above stated of actual annexation to the freehold, as a rule for determining when chattels become part of the realty, is as well settled in this state as any other rule of property. Exceptions founded on fanciful and groundless distinctions only tend to produce uncertainty and confusion in the rules of property, which should be permanent and uniform. 'The general importance of the rule,' says Judge Cowan, 'which goes upon corporeal annexation, is so great that more evil will result from frittering it away by exceptions than can arise from the hardship of adhering to it in particular cases.' *Walker v. Sherman*, 20 Wend. (N. Y.) 656. Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But unattached machinery in a factory, the implements of husbandry on the farm, and furniture in a hotel are similarly adapted for use in the factory, on the farm, or in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become part of the realty, engines and cars and the rolling stock of a railroad utterly fail to answer the requirement of the law.

⁴⁴ *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484.

can, of course, be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and, except, in cases of accident, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and, in fact, cannot be applied to any other purpose; they are not, like farming utensils, and, possibly, the machinery in factories, and many of the movable appliances to stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. Many of these are strong characteristics of the realty; some of them have often been deemed conclusive."

On the other hand, those cases that do not admit that the rolling stock of a railroad is a fixture base their decision upon the want of localization in its use, aside from its other personal characteristics. In *Hoyle v. Plattsburgh & M. R.*

Cars which left Jersey City this morning, before the close of the succeeding week will be found scattered over the west, or on the Pacific coast, their places in transportation through this state being supplied by cars gathered from the railroads of other companies, many of which are located in other states. The suggestion that each one of these cars carries with it the attribute of realty in its journey through other states, or even over other railroads in this state, will show the incongruity of denominating that a fixture which, in its ordinary use, travels over other railroads, and is connected with the railroad of its owner in no other way than in its useful employment in the business in which the company is engaged. In *Randall v. Elwell* [52 N. Y. 521] Judge Grover says: 'I think no one would claim that a car of the New York Central which, in the course of business, had been run to Chicago, was part of its real estate while there; and, if not such, I can discover no principle upon which the character of the property should be changed when it reaches the Central track on its return trip to New York.'

Co.,⁴⁵ Johnson, C., said: "Looking, now, at the rolling stock of a railroad, it is originally personal in its character; it is subservient to a mere personal trade,—the transportation of freight and passengers. The track exists for the use of the cars, rather than the cars for the use of the track. There is no annexation, no immobility, from weight; there is no localization in use. The only element on which an argument can be based to support the character of realty is adaptation to use with and upon the track. Even, in respect to this, were the same contrivance adopted by a tenant for use in his trade upon leased lands, his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for then unity of ownership in track and cars, and independence of roads upon each other, seemed to render it possible to consider rolling stock part of the realty without introducing great inconvenience. At the present time, independent companies exist, owning no tracks, whose trains run through state after state on the railroad track of other companies. It is no uncommon sight to see the cars of half a dozen companies formed into a single train, and running from New York to Illinois and Missouri. It is impossible to deal with such property as part of the realty without introducing anomalies and uncertain ties of the gravest character. * * * In my judgment, the want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling stock of a railroad."

⁴⁵ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595.

— (4) Miscellaneous instances.

The doctrine as to constructive annexation has been extended, in some cases, so as to include mill chains, bars, etc., used in connection with machinery,⁴⁶ to iron rolls and plates and other loose machinery,⁴⁷ to a steelyard hanging in a machine house,⁴⁸ to a Virginia rail fence,⁴⁹ to manure about a barn,⁵⁰ to the stock of slaves, cattle, and implements on West India real estate,⁵¹ and even, in a recent case, to ice in an ice house.⁵²

— (5) Chattels temporarily severed.

But perhaps the more exclusive application of the term “constructive annexation,” wherein the theory of gravity as a force sufficient to constitute annexation, or the fact that the chattel is an essential ingredient of the realty, and a part of the whole, does not occur, is in respect either to those articles that were fixtures, but have been temporarily severed, or to cases where articles have been brought upon the land with the manifest intention to annex. Thus, hop-poles taken down and piled in a yard were held to be fix-

⁴⁶ *Farrar v. Stackpole*, 6 Me. 154.

⁴⁷ *Christian v. Dripps*, 28 Pa. 271; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; *Ege v. Kille*, 84 Pa. 333; *Morris' Appeal*, 88 Pa. 368.

⁴⁸ *Rex v. Churchwardens of St. Nicholas*, 1 Term R. 723.

⁴⁹ *Walker v. Sherman*, 20 Wend. (N. Y.) 646.

⁵⁰ *Lassell v. Reed*, 6 Me. 222; *Staples v. Emery*, 7 Me. 203; *Trull v. Fuller*, 28 Me. 545; *Sawyer v. Twiss*, 26 N. H. 345; *Kittredge v. Woods*, 3 N. H. 503; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Daniels v. Pond*, 21 Pick. (Mass.) 367.

⁵¹ *Lushington v. Sewell*, 1 Sim. 435, 480.

⁵² *Hill v. Mundy*, 89 Ky. 36.

tures;⁵³ and so, fencing materials on a farm which have been used as a part of a fence, but are temporarily detached;⁵⁴ likewise, a millstone temporarily removed for repairs is still a part of the realty;⁵⁵ and so, rolls forming part of the machinery of a mill,⁵⁶ and mill saws and leather belting temporarily severed and stored in a file room adjoining the mill;⁵⁷ so, a cast-iron cylinder essential to a furnace, which is a part of the realty.^{57a} The parts of a barn, such as stanchion timbers, hinge staples, tie chains, and planks, are still part of the realty, though temporarily

⁵³ In *Bishop v. Bishop*, 11 N. Y. 124, Gardiner, C. J., said: "The root of the hop is perennial, continuing for a series of years. That this root would pass to a purchaser of the real estate there can be no question. The hop pole is indispensable to the proper cultivation of this crop. * * * If the poles had been standing in the yard at the time of the sale all admit that they would have formed a part of the realty. But by being placed in heaps for a temporary purpose, they would not lose their distinctive character, as appurtenant to the land, any more than rails or boards from a fence in the same condition would become personal property. * * * I think * * * that hop poles which are put into the ground every season, and continue there until they are removed to gather the crop, and which are designed to be thus used, in the same yard for the same purpose, until they decay by lapse of time, may, without impropriety, be considered as 'habitually attached to the land,' although 'not constantly fastened to it.'"

⁵⁴ *McLaughlin v. Johnson*, 46 Ill. 163; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Walker v. Sherman*, 20 Wend. (N. Y.) 639; *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80.

⁵⁵ *Wystow's Case of Gray's Inn*, Y. B. 14 Hen. VIII. 25b; *Reg. v. Wheeler*, 6 Mod. 187.

⁵⁶ *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116. See, also, *Lewis v. Rosler*, 16 W. Va. 333.

⁵⁷ *Burnside v. Twitchell* (1861) 43 N. H. 390.

^{57a} *Heaton v. Findlay*, 12 Pa. 304.

severed while repairing the barn;⁵⁸ and so, hotel fixtures removed from the hotel while on fire are still a part of the realty.⁵⁹

— (6) Articles recently brought upon the realty.

Articles brought upon the realty with the intention of annexing them have been held, in some cases, a part of the realty, such as fencing material lying loose,⁶⁰ machinery,⁶¹

⁵⁸ *Wadleigh v. Janvrin* (1860) 41 N. H. 503. But in *Blethen v. Towle* (1855) 40 Me. 310, it was held that stoves which, when standing in their places for use, were part of the realty, were not so when temporarily severed and stored away for the summer.

⁵⁹ *Curry v. Schmidt*, 54 Mo. 515.

⁶⁰ Rails and other fencing materials distributed upon the land with the manifest intention of immediately using them in erecting a fence are a part of the realty. *Ripley v. Paige*, 12 Vt. 353; *Conklin v. Parsons*, 2 Pin. (Wis.) 264; *McLaughlin v. Johnson*, 46 Ill. 163.

Stone posts deposited on a farm for the purpose of constructing a fence are a part of the realty. *Hackett v. Amsden*, 57 Vt. 432.

But where rails and other fencing materials are piled upon the land, and not distributed so as to show an immediate intention to annex, it appears that they are personal property. *Robertson v. Phillips*, 3 G. Greene (Iowa) 220; *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173; *Thweat v. Stamps*, 67 Ala. 96; *Wing v. Gray*, 36 Vt. 261.

And, likewise, lumber placed on a lot for the purpose of making a dwelling house is not a part of the realty. *Carkin v. Babbitt*, 58 N. H. 579.

So, windows and window blinds. *Peck v. Batchelder*, 40 Vt. 233.

So, a stone placed in a yard for the purpose of being fitted at some future time as a doorstep to the house is not a fixture. *Woodman v. Pease*, 17 N. H. 282.

⁶¹ An engine and boiler hauled into a mill yard with the intention to put them in the mill are fixtures. *Patton v. Moore*, 16 W. Va. 428. Contra, *Buckout v. Swift*, 27 Cal. 433.

"Railroad spike machines," weighing from fifty to sixty hundred pounds, one resting on a car in the company's yards, the other on the ground, brought by the company to their grounds for the pur-

railroad stock and ties⁶² not in place. It may be stated, however, that the courts are not at all in harmony as to the question whether a mere bringing and leaving a chattel

pose of attaching them to a mill, are fixtures. *McFadden v. Crawford*, 36 W. Va. 671.

But mill saws purchased for use in a mill, and kept there for more than a year without being annexed, were held not to be fixtures. *Burnside v. Twitchell*, 43 N. H. 390.

And so, a steam engine and other machinery on the ground ready to be annexed are not fixtures, even though the intention to annex is evident. *Miller v. Wilson*, 71 Iowa, 610.

So, in the case of *Johnson v. Mahaffey*, 43 Pa. 308, rolls cast for a rolling mill paid for and delivered at the mill, where they remained for more than two years without being turned or finished off or put into the mill, were held not a part of the realty. *Lowrie, C. J.*, said: "These rolls were cast for this rolling mill, and paid for and delivered beside it, and lay there two or three years without being turned or finished off, or put into the mill, and then the mill was sold by the sheriff. Do the rolls go with the mill to the purchaser? The test question is, were they elementary parts of the mill at the time of the sale? And, as matter of fact, it is quite plain that they were not, for the mill had always run without them. No doubt they were intended to be made part of the mill, but we do not see how we can take the intention, without fact, in order to declare what constitutes the mill. If we do, then the sale of a half-built or half-ruined house would include all the materials provided for its completion or repair.

"A very provident man is quite sure to have on hand materials which he sees will some time be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus, he will provide extra saws for a saw mill, or bolting cloth for a flour mill, or extra castings for the running gear, or lumber, nails, screws, and other materials to make improvements or repairs; but this prudence does not convert personal into real property, so long as the fact remains that they are not yet made

⁶² *Palmer v. Forbes*, 23 Ill. 301.

upon land, even with the manifest intention to annex it in some way to the freehold, can constitute it a fixture. Many of the courts have been exceedingly reluctant to extend the idea of constructive annexation thus far.⁶³

— (d) Injury by removal—In general.

In connection with annexation, there is another circumstance to which some courts have attached much importance as a test in determining the question whether a chattel is a fixture or not, namely, the injury liable to result to the freehold in the removal of the chattel. At the common law, it was an established maxim that the principal thing should not be destroyed by taking away the accessory.⁶⁴ Accordingly, chattels whose removal would cause irreparable damage to the freehold were held to be a part of the realty. In the earlier English cases the character of an article, the purpose and mode of its annexation, and the effect of its removal upon the realty were controlling tests in determining the character of a chattel as realty or personalty. The last of these tests was practically conclusive, for any act of the tenant or lessee that destroyed or impaired the landlord's estate was waste, and subject to be enjoined by a

constituent elements of the mill or other structure. That fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever-varying degrees of prudent forethought. And if mere intention could affix such articles to the realty, then a mere change of intention would unfix them, or prevent their becoming affixed, and we should thus be without any rule at all to guide us."

⁶³ Ante, notes 60, 61; *Blathen v. Towle*, 40 Me. 310; *Johnson v. Me-haffey*, 43 Pa. 308.

⁶⁴ Lord Hardwicke in *Lawton v. Lawton*, 3 Atk. 15; *Amos & Fe-rard*, *Fixtures*, p. 35; *Ewell*, *Fixtures*, p. 99.

court of equity; but when the exceptions to the general rule or law of fixtures in favor of trade and ornamental fixtures became fixed and settled, the English courts, from necessity, had to give a very liberal interpretation to this test of injury by removal.⁶⁵ In fact, the nature and character of many of these so-called "trade fixtures" rendered it impossible to remove them without occasioning considerable damage to the freehold; but instead of prohibiting their removal under the old rule, it seems to have been generally understood and conceded in practice that, where such damage was occasioned, the landlord or owner of the estate had a right of action against the tenant for the damage sustained.⁶⁶

— (1) Present importance.

Though, as a pre-eminent test in determining the character of a chattel, it early declined, yet its importance as a circumstance to show the intention of the parties became no less great as the question of intention came to be recognized as the real ultimate test of determining a chattel as a fix-

⁶⁵ Amos & Ferard, *Fixtures*, pp. 35, 36, 69, 70; Ewell, *Fixtures*, p. 99.

Campbell, C. J., in *Martin v. Roe* [7 El. & Bl. 237, 244], says: "In all cases of this kind, injury to the freehold must be spoken of with less than literal strictness. A screw or a nail can scarcely be drawn without some attrition; and when all the harm done is that which is unavoidable to the mortar laid on the brick walls [the articles in question in this case being hothouses of frame and glass work, resting on and imbedded in mortar on brick walls], this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle, the criterion of injury to the freehold would be idle."

⁶⁶ *Foley v. Addenbrooke*, 13 Mees. & W. 174.

ture, removable or not. Hence, at the present day, the question whether an annexed chattel can be removed or not without injury to the freehold is often an important factor in arriving at the intention of the parties. A few of the state courts have given a very strong conclusive effect to the test of injury by removal. In Georgia, the court has gone so far as to make this the prime test, by saying: "Wherever the article can be removed without essential injury to the freehold or the article itself, it is a chattel; otherwise, it is a fixture. This rule is recommended by its simplicity and definiteness."⁶⁷ The rule is certainly simple and definite, but it will hardly prove acceptable to the majority of the courts, for it fails utterly in its application to many annexed articles. There are many chattels which are removable without the slightest injury to the freehold itself, yet they are irremovable fixtures.⁶⁸ Such are keys, doves, heirlooms, articles attached by the force of gravity, and the long list of chattels constructively annexed. On the other hand, there are many chattels that occasion much injury to the premises by their removal, yet they are remov-

⁶⁷ In *Wade v. Johnston*, 25 Ga. 331, Lumpkin, J., said: "The rule of the common law, as we understand and adopt it, may be summed up in a single sentence, and it is this: Wherever the article can be removed without essential injury to the freehold or the article itself, it is a chattel; otherwise, it is a fixture. This rule is recommended by its simplicity and definiteness. Depart from it, and we are at sea, without chart or compass. This rule, of course, may be controlled by the agreement of the parties, as well as by established usage or custom."

⁶⁸ *Sweetzer v. Jones*, 35 Vt. 317; *Doughty v. Owen* (N. J. Ch.) 19 Atl. 540.

able fixtures, because the intention of the parties has been so ascertained.⁶⁹

In Vermont⁷⁰ and Alabama⁷¹ the courts consider this test as a strong factor in determining the character of a fixture. So, in Nebraska,⁷² in the case of *Friedlander v.*

⁶⁹ *Wall v. Hinds* (1855) 4 Gray (Mass.) 271; *Talbot v. Whipple* (1867) 14 Allen (Mass.) 177. In *Dostal v. McCaddon* (1872) 35 Iowa, 318, a vault for banking purposes was built within a building, on its own foundation, and within this was constructed a safe too large to be removed without tearing down the vault. Both the vault and the safe were held to be trade fixtures.

⁷⁰ In *Harris v. Haynes*, 34 Vt. 225, the court said: "Actual annexation to the freehold and adaptation to its purposes is not sufficient to convert chattels into fixtures unless they are fastened in such a manner as to show an intention to incorporate them firmly with the inheritance; and that, if articles of machinery, used in a factory for manufacturing purposes, are only attached to the buildings to keep them steady and in their place, so that their use as chattels, may be more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold, or to the articles themselves, they still remain personal property." Followed by *Kendall v. Hathaway*, 67 Vt. 122.

⁷¹ So, in *Capital City Ins. Co. v. Caldwell*, 95 Ala. 90, Stone, C. J., said: "The primary meaning of the word 'fixture' is 'that which is fixed or attached to something as a permanent appendage.' In law it takes a wider range. Anything fixed or attached to a building, and used in connection with it, is a fixture, whether it be a permanent appendage or not. Hence, in legal jurisprudence, there are movable fixtures and immovable fixtures. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture, and is a chattel. It is no part of the realty, and does not pass with a conveyance of the freehold. If, however, it be so connected with the building as that it cannot be severed from it without injury to the building,—a disturbance of its rounded completeness,—then it is part of the realty, and it passes with the conveyance of the soil."

⁷² In *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, where a (70)

Ryder, the court says: "The modern decisions are to the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession." While these courts appear to give to the test of injury by removal a prominent effect, nevertheless the weight of modern decisions is simply to consider this test as a circumstance which goes to establish the intent of the parties,—the real and ultimate test,—and to treat as supplementary thereto all the heretofore usual tests of ascertaining a fixture.⁷³

tenant erected upon leased premises a two-story building, and so annexed it to another building by joining it thereto, with studding, ship lap, and otherwise, as to occasion the estate material injury by its removal, the court said: "We do not deny the right to remove this addition on the ground that it was attached to the freehold, but because the improvement was of such a character, and was so annexed to the main building, that its removal would greatly injure the demised premises. The modern decisions are to the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession."

⁷³ *Tillman v. De Lacy*, 80 Ala. 103. See *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; *Capen v. Peckham*, 35 Conn. 88; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 214; *Cunningham v. Cureton*, 96 Ga. 489; *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260; *Reyman v. Henderson Nat. Bank*, 98 Ky. 748; *Pope v. Jackson*, 65 Me. 162; *Hawkins v. Hersey*, 86 Me. 394; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Allen v. Mooney*, 130 Mass. 155; *McLaughlin v. Nash*, 14 Allen (Mass.) 136, 92 Am. Dec. 741; *Shapira v. Barney*, 30 Minn. 59; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Lathrop v. Blake*, 23 N. H. 46; *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 88 Hun (N. Y.) 569; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471; *Kelsey v. Durkee*, 33 Barb.

— (2) What constitutes injury.

It was early laid down as a principle that if a chattel could not be removed bodily, so as not to lose its identity, or could not be so taken into pieces as to be put up the same as before, it was in effect a destruction of the chattel and an injury to the freehold;⁷⁴ particularly so if the removal of the fixture would completely destroy it as such, for that, in itself, furnished an intention to dedicate it to the realty.⁷⁵ However, in the case of trade fixtures, the weight of authority does not seem to consider the destruction of the chattel about to be removed as a material element in determining its removability, although taken into consideration as a factor in ascertaining the intention of the parties.⁷⁶ In ascertaining the injury done to premises in the removal of fixtures, the rule is given that the premises must be in

(N. Y.) 410; *Wetherby v. Foster*, 5 Vt. 136; *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639; *Chase v. Tacoma Box Co.*, 11 Wash. 377; *Walker v. Grand Rapids Flouring Mill Co.*, 70 Wis. 92; *Moody v. Aiken*, 50 Tex. 65.

⁷⁴ *Whitehead v. Bennett* (1858) 27 Law J. Ch. 474, 6 Wkly. Rep. 351; *Leach v. Thomas*, 7 Car. & P. 327.

⁷⁵ *Wall v. Hinds* (1855) 4 Gray (Mass.) 271; *Talbot v. Whipple* (1867) 14 Allen (Mass.) 177; *Kutter v. Smith*, 2 Wall. (U. S.) 491; *Collamore v. Gillis*, 149 Mass. 578.

Tenant's right of removal: In removing a fixture, the fact that the annexed chattel must be taken to pieces, and that some injury will result to the same in the removal, is not conclusive against a tenant's right of removal. *Gunderson v. Kennedy*, 104 Ill. App. 117; *Baker v. McClurg*, 198 Ill. 28.

⁷⁶ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137; *Moore v. Wood* (1860) 12 Abb. Pr. (N. Y.) 393; *Dostal v. McCaddon* (1872) 35 Iowa, 318; *Cromie v. Hoover* (1872) 40 Ind. 49; *Antoni v. Belknap* (1869) 102 Mass. 193; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *White's Appeal*, 10 Pa. 252; *Gunderson v. Kennedy*, 104 Ill. App. 117.

as good plight and condition after the removal as they were before annexation.^{76a} This must not be applied with literal strictness. It means that in the removal of a chattel no substantial injury shall be done to the realty,—nothing shall be done to render the property inefficient or less subservient for that purpose.

— (e) **Annexation, by whom made—Generally.**

Although there be physical annexation of a chattel to the freehold, and an intention on the part of the party annexing to affix it permanently, yet the chattel may not become an irremovable fixture for the reason that it has not been annexed by the owner of it. The general rule is stated that a chattel, to be an irremovable fixture, must have been annexed by the owner thereof.⁷⁷ Judge Ladd, in *Cochran v. Flint*,⁷⁸ on this proposition, says: “The rule is, and this is elementary, that the movable must be affixed by the owner of it, and affixed in the course of his general use and occupation of the immovable, and I venture the remark that not a case can be found where it is held that the owner would be divested of his title if the movable thing is affixed without his consent, either express or im-

^{76a} *Whiting v. Brastow*, 4 Pick. (Mass.) 311; *Seeger v. Pettit*, 77 Pa. 437; *Martin v. Roe*, 7 El. & Bl. 237; *Taylor, Landlord & Tenant*, § 550.

⁷⁷ *D'Eyncourt v. Gregory*, L. R. 3 Eq. 394; *Cochran v. Flint*, 57 N. H. 544; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101; *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446.

⁷⁸ *Cochran v. Flint*, 57 N. H. 544, approved by Judge Cooley in his dissenting opinion in *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446.

plied." So, in *General Electric Co. v. Transit Equipment Co.*,⁷⁹ Pitney, V. C., said: "It seems to me that it is an essential part of an efficient annexation of a chattel * * * that the chattel shall be the property of the person who performs the act of annexation, or that the purpose of the annexation shall be acquiesced in by the owner of the property." But the application of this rule is doubted where the rights of third parties, who are without notice, are concerned. Thus, where a chattel is so annexed to the freehold, by one not the owner, as to ordinarily become a part thereof, the rightful owner cannot claim the fixture as against the owner of the realty, who is *bona fide* and without notice.⁸⁰ However, it seems that, where chattels are tortiously taken and annexed to the freehold of the tortfeasor, they cannot become fixtures irremovably as against the true owner;⁸¹ and likewise, where the owner of the realty⁸² or

⁷⁹ *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. In England, in the case of *D'Eyncourt v. Gregory*, L. R. 3 Eq. 394, it was held that tapestry, marbles, and the like, which were detached at the death of the testator, who was the owner thereof, could not be attached by the next tenant in life to the freehold, so as to constitute the same fixtures.

⁸⁰ *Dorr v. Dudderar*, 88 Ill. 107; *Ricketts v. Dorrel*, 55 Ind. 470; *Detroit & B. C. R. Co. v. Busch*, 43 Mich. 571; *Huebschmann v. McHenry*, 29 Wis. 655. See post, c. 14, § 109b, "Trover"; "Tortious Severance," and notes 47, 48; also chapter 14, § 110b, "Replevin"; "Tortious Severance."

⁸¹ In the case of *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, a vendee under contract to purchase erected on the land a small dwelling house. Failing in his land payments, he was compelled to surrender possession. He moved the house to the land of a neighbor. The original vendor brought replevin, and it was held that he could maintain the action, inasmuch as the house, by the wrongful act of the vendee, did not become realty.

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mortgagee⁸³ thereof has notice that the person annexing the chattel has not title thereto, the chattel does not become a part of the realty. But it appears that chattels which, by annexation, lose their identity as such, become a part of the realty, irrespective of the person who annexed them.⁸⁴ Thus, stone obtained from a quarry without the owner's consent, and laid into a stone walk upon the land of another,⁸⁵ and fence rails and stakes unlawfully taken and used by the wrongdoer in the construction of a fence,⁸⁶ have been held a part of the realty.

— (1) Conditional vendors.

This question arises most frequently in conditional sales, where the vendor sells the chattel to the party annexing, with the express understanding that the title shall remain in the vendor until the chattel is paid for. As between the immediate parties to the agreement, there is no doubt that the

on a tract of land, and erected thereon a stone building, the foundations of which were set in the soil, for lighthouse purposes, and then sought to condemn the land for public use, the brick house is a fixture, for which the owner can recover damages upon condemnation of the land. *United States v. Certain Tract of Land in Monterey County*, 47 Cal. 515. See, also, *Gill v. De Armant*, 90 Mich. 425, 51 N. W. 527; *Cochran v. Flint*, 57 N. H. 544.

⁸² *Walker v. Grand Rapids Flouring Mill Co.*, 70 Wis. 92.

⁸³ *Ford v. Cobb*, 20 N. Y. 348.

⁸⁴ *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233; *Fryatt v. Sullivan Co.*, 7 Hill (N. Y.) 529; *Detroit & B. C. R. Co. v. Busch*, 43 Mich. 571; *Davis v. Easley*, 13 Ill. 198. The theory is that the owner of personal property can pursue it as long as he can identify it as such. *Davis v. Easley*, 13 Ill. 198.

⁸⁵ *Jackson v. Walton*, 28 Vt. 43.

⁸⁶ *Ricketts v. Dorrel*, 55 Ind. 470.

article retains its character of personalty;⁸⁷ but when the matter arises between a conditional vendor and a *bona fide* purchaser or mortgagee of the land, the determination of this question is more difficult. By some of the courts it is held that an annexation under these circumstances does not destroy the character of the chattel as personalty and that it is removable even as against a *bona fide* purchaser or mortgagee of the realty.⁸⁸ Even this ruling, however, is subject to the limitation that the chattel shall not lose its identity in the annexation, and that the premises shall not be injured by its removal. Many of the later cases, upon equitable grounds, adopt the contrary rule as between a conditional vendor and subsequent innocent purchasers or mortgagees of the freehold. In *Wickes v. Hill*,⁸⁹ Grant, J., states: "The rule is settled beyond controversy in this state that, as to conditional sales of personal property re-

⁸⁷ *Frey-Sheckler Co. v. Iowa Brick Co.*, 104 Iowa, 494, 73 N. W. 1051.

⁸⁸ *Ford v. Cobb*, 20 N. Y. 344; *Sheldon v. Edwards*, 35 N. Y. 279; *Hensley v. Brodie*, 16 Ark. 511; *Mott v. Palmer*, 1 N. Y. 564; *Godard v. Gould*, 14 Barb. (N. Y.) 662; *Tapley v. Smith*, 18 Me. 12; *Russell v. Richards*, 10 Me. 429; *Hilborne v. Brown*, 12 Me. 162; *Crippen v. Morrison*, 13 Mich. 34; 13 Am. & Eng. Enc. Law, p. 625.

⁸⁹ *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375. In this case a boiler, engine, and shingle-mill equipment were sold by the plaintiffs upon condition that the title should remain in them until certain sums were paid, and that the machinery in question should not become a fixture by being annexed to the realty. The machinery was built into the mill by the vendee in quite a substantial manner, the boiler being bricked in on its top and sides, and the engine bolted through a solid foundation. The vendee, after having so attached the machinery, conveyed the land to a *bona fide* mortgagee, as against whom it was held that the original vendors could not maintain title.

taining the title in the vendor until paid for, no subsequent vendee obtains the title while the property remains personally. This is upon the theory that the possession of movable property, known as 'chattels,' is not conclusive of ownership or right of possession, and that he who buys takes subject to the title of the real owner. When personal property is attached to and becomes a part of the realty, a different rule applies. Title of record and possession of real estate are usually conclusive, and a *bona fide* holder takes title free from any existing equities. As between the original vendor and vendee, no title passes, and as between them the vendee cannot make it realty contrary to his agreement. In such cases, the intention of the parties must govern. When, however, the vendor sells machinery which it is well understood may, and, in the absence of agreement, does, become part of the realty by being so attached that it cannot be removed without injury, and thereby places it in the power of his vendee to so attach it, and sell or mortgage to innocent third parties, the better and more just rule is that he must suffer. * * * For the vendor, having put it in the power of the vendee to attach them as a fixture to the land, and, as such, to sell to innocent purchasers, is not in a situation to complain."⁹⁰

This ruling has been upheld by perhaps the better weight of judicial opinion.⁹¹ In cases where it can be shown that

⁹⁰ Thomson v. Smith, 111 Iowa, 718, 83 N. W. 789. In this case a vendor sold certain platform scales upon condition that title thereto should not pass until full payment for the same was made. In foreclosure proceedings to enforce a mechanic's lien, the realty to which the scales had been attached was sold under judgment, and the scales were held to be irremovable fixtures.

⁹¹ Haven v. Emery, 33 N. H. 69; Voorhees v. McGinnis, 48 N. Y.

the parties had notice, actual or constructive, the rule is different.⁹² Thus, in a Michigan case,⁹³ a vendor sold upon condition, retaining the title in himself until paid for, a boiler and engine which were solidly affixed to the vendee's factory. The defendant, holding a chattel mortgage on the chattels, purchased the realty to which they were attached. It was held that he could not claim the same as fixtures. And as against prior mortgagees of the realty, for equitable reasons, it was decided in a Minnesota case⁹⁴

278; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22; *Bass Foundry & Machine Works v. Gallentine*, 99 Ind. 525; *Jenks v. Colwell*, 66 Mich. 420, 33 N. W. 528; *Davenport v. Shants*, 43 Vt. 546; *Porter v. Pittsburgh Bessemer Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206; *Fryatt v. Sullivan Co.*, 5 Hill (N. Y.) 116; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375; *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works* (Tex. Civ. App.) 41 S. W. 835; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; *Muir v. Jones*, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364.

⁹² As to the effect of recording a conditional conveyance, the same as a chattel mortgage, upon purchasers or mortgagees of the realty, see the topics following, on chattel mortgages.

⁹³ *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667. The strong opinion written by Judge Long will appear much modified by the subsequent case of *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375.

⁹⁴ *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1031.

So, in *Merchants' Nat. Bank v. Stanton*, 55 Minn. 217, 56 N. W. 821, Mitchell, J., says: "It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty; but this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which

that a storage plant annexed to the realty with an express stipulation that it remain the property of the vendor until paid for, remained personalty, upon the ground that the prior mortgagee had no equities to invoke, being neither misled, nor having advanced any consideration on the strength of the machinery becoming a part of the realty.

In Illinois, such conditional sales have been generally held void as to third parties, particularly where the seller

the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance; but the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence, in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not of itself make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation. *Crippen v. Morrison*, 13 Mich. 23; *Davenport v. Shants*, 43 Vt. 546.” This opinion and rule was followed by the case of *Pioneer Savings & Loan Co. v. Fuller*, 57 Minn. 60, where a tenant of the mortgagor, during the pendency of the year of redemption from a foreclosure sale, set in a house a mantel, grate, and tiling with the express agreement between the landlord and tenant that they remain personal property.

undertakes to secretly retain title in himself, and permits chattels to be attached to the realty, so as to ordinarily become a part thereof.⁹⁵ But where the conditional contract is executed and recorded like a chattel mortgage, it doubtless in some states has the effect of giving constructive notice of the agreement to all parties.⁹⁶

— (2) Chattel mortgagees.

The same rules and principles applying to conditional vendors apply to those holding partial interests in personal property, such as a chattel mortgage; the general rule being that the mortgagee of a chattel cannot be divested of his right by the act of a subsequent purchaser in affixing a chattel to the realty.⁹⁷ The operation of the rule, however, depends greatly upon the relations of the parties. As to prior mortgagees of the realty, it seems effective in many

⁹⁵ *Fifield v. Farmers' Nat. Bank*, 47 Ill. App. 122; *Jennings v. Gage*, 13 Ill. 610; *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Ill. 488; *Chickering v. Bastress*, 130 Ill. 206. See *Starr & C. Ann. St. Ill.* (2d Ed.) p. 2743, par. 1.

⁹⁶ *Sword v. Low*, 122 Ill. 487. In that case the vendor sold a boiler and engine, taking a chattel mortgage thereon to secure the purchase price. The vendee annexed the machinery to his real estate, and afterwards conveyed the same to an innocent third party, his creditor. It was held that the filing of the chattel mortgage gave constructive notice to the purchaser, and that the property therefore remained personalty.

Chattel mortgages duly recorded under the laws of this state give constructive notice to all subsequent purchasers and incumbrancers, even if the chattels are attached to real estate. *Craig v. Dimock*, 47 Ill. 319. See *Sowden v. Craig*, 26 Iowa, 163, and post, note 100.

⁹⁷ *Grand Island Banking Co. v. Frey*, 25 Neb. 66, 13 Am. St. Rep. 478.

courts;⁹⁸ but as to subsequent* innocent purchasers and mortgagees of the realty, the courts seem unwilling to extend the rule. It appears important in this connection to note that a distinction is drawn between the effect of a chattel mortgage given before the article is annexed and of one given after annexation. For where a chattel mortgage is executed upon a chattel before it is annexed to the freehold, it gives constructive notice, at least, to prior mortgagees of the realty, of the character of the article, and relieves the chattel mortgagee of notice of a contrary character.⁹⁹ Like-

⁹⁸ *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 217, 56 N. W. 821. *Contra*, *Frankland v. Moulton*, 5 Wis. 1; *Cooper v. Cleghorn*, 50 Wis. 121, 6 N. W. 491; *Taylor v. Collins*, 51 Wis. 127, 8 N. W. 22; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364; *Homestead Land Co. v. Becker*, 96 Wis. 210, 71 N. W. 117.

⁹⁹ In the case of *Eaves v. Estes*, 10 Kan. 314, plaintiffs constructed a steam engine for a mill, and before it left their shop took a chattel mortgage upon the same to secure the purchase price, with a stipulation that they might remove the engine, whether attached to the realty or not. As against a prior mortgagee of the premises to which the engine was affixed, it was held that the property remained personalty, and hence subject to the chattel mortgage. So in the case of *Tibbetts v. Moore*, 23 Cal. 208. See, also, *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268; *Simons v. Pierce*, 16 Ohio St. 215; *First Nat. Bank of Waterloo v. Elinore*, 52 Iowa, 541, 3 N. W. 547; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. 160.

In *Tift v. Horton*, 53 N. Y. 377, the plaintiff sold an engine and boiler, taking thereon a chattel mortgage to secure the unpaid purchase money, which mortgage provided that the engine and boiler should remain personal property, notwithstanding the manner in which it might be annexed to a certain elevator. The engine and boiler were affixed to the freehold in the manner customary with such machines by the vendee. The premises, being foreclosed through a real-estate mortgage made prior to the annexation, passed

wise, the filing of a chattel mortgage gives constructive notice to prior mortgagees of the realty of the character of a chattel,¹⁰⁰ although this is denied by some courts.¹⁰¹ Very few of the courts have extended the constructive notice of a recorded chattel mortgage to subsequent *bona fide* purchasers and mortgagees.¹⁰² But as to execution purchas-

to the defendant as purchaser, against whom plaintiff brought conversion, and it was held that he could recover.

¹⁰⁰ "The notice imparted by the due and proper record of such an instrument, though called a 'constructive notice,' is just as effectual for the protection of the rights of the parties as an actual notice by the word of mouth, or otherwise; any other construction of our registry laws would effectually nullify them." *Sowden v. Craig*, 26 Iowa, 163. See *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571.

¹⁰¹ In *Frankland v. Moulton*, 5 Wis. 1, the owner of a steam engine sold the same to the mortgagor, and assisted in annexing the same to the realty, reserving a chattel mortgage for a part of the purchase money. It was held that the chattel mortgage was ineffectual as against the prior equitable mortgagee. So, in *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465, a dynamo plant affixed in a mill building was so placed, under contract to purchase from the vendor. There was a real-estate mortgage on the premises at the time of the annexation, and it was held that the mortgagee of the real estate took the dynamo plant as a fixture.

¹⁰² In *Sowden v. Craig*, 26 Iowa, 156, the constructive notice given by recording a chattel mortgage which was executed upon certain engines, boilers, and saws, and recorded before their annexation to the realty, was held effective as actual notice as against the defendant purchaser at an execution sale to enforce a mechanic's lien. And in *Ford v. Cobb*, 20 N. Y. 344, where salt kettles were bought and mortgaged to the seller as personalty to secure the purchase price, and were afterwards affixed to the realty, it was held that they continued personalty, as against a subsequent purchaser of the realty, who had no notice of the facts other than constructively from the filing of the chattel mortgage. Contra, *Tibbetts v. Horne*, 65 N. H. 242.

ers of the real estate, it appears that a chattel mortgage executed before the annexation of the chattel impresses it with the character of personalty, for the reason that the execution purchaser takes only the title that the judgment debtor had, and subject to the equities existing against that title.¹⁰³ However, where the owner of a chattel which has been affixed to the freehold gives simultaneously a chattel mortgage and a real estate mortgage thereon, the chattel does not take the character of personalty as against the mortgagee of the realty.¹⁰⁴

— (f) **Mistake in annexation.**

Where the owner of the chattel, through a mistaken belief as to the ownership of the realty, annexes the chattel thereto, the general rule is that the chattel so annexed becomes a part of the freehold, and cannot be removed by the annexor.¹⁰⁵ This is the almost universal holding where the mistake is unilateral, or without the fault, knowledge, or acquiescence of the owner of the freehold.¹⁰⁶ This ques-

¹⁰³ *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Edwards & Bradford Lumber Co. v. Bank*, 57 Neb. 323, 77 N. W. 765.

¹⁰⁴ *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426; *Miles v. McNaughton*, 111 Mich. 350. So, in *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117, a mortgagor firmly fastened a boiler, engine, and shafting in a nail and tack factory and subsequently gave both a real-estate and a chattel mortgage of the property. As between the chattel mortgagee and a levying judgment creditor, the chattels were considered a part of the realty.

¹⁰⁵ *Burlerson v. Teeple*, 2 G. Greene (Iowa) 542; *Dutton v. Ensley*, 21 Ind. App. 46, 51 N. E. 380; *Stillman v. Hamer*, 7 How. (Miss.) 421; *Honzik v. Delaglise*, 65 Wis. 501, 56 Am. Rep. 634.

¹⁰⁶ A person erected a rail fence by mistake upon land of the

tion arises most frequently where houses are erected upon real estate under a mistaken belief as to the ownership thereof, or where fences are placed by mistake upon the land of another.¹⁰⁷ But where there is a mutual mistake between the

United States, which was afterwards sold by the United States to an innocent third party, and it was held that the fence went with the realty. *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556.

In the case of *Mitchell v. Bridgman*, 71 Minn. 360, 74 N. W. 142, the defendant erected a house upon the lot of another by mistake, supposing that this lot was his own, and it was decided that the house became a part of the realty.

Adjoining landowners agreed to put up a line of fence, each to own the portion put up by him, and the fence built by one was mistakenly located upon the land of the other. Upon sale of the land to a purchaser without notice, the fence was held a fixture. *Climmer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135.

Yet in Michigan, where one of two adjoining landowners failed to erect his part of a partition fence, as required by statute, and the other built it himself without resorting to the aid provided by statute, it was held that the accidental misplacing by the latter, without intent to commit trespass, of his fence a few feet over the line on his neighbor's property, did not involve a forfeiture by him of the fence rails so placed. *Curtis v. Leasia*, 78 Mich. 480.

The rule was considered to be modified in the case of *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284, where a railroad company dug a well, and put in a pump and boiler for the purpose of filling its tank on the line of its railroad, and used the same for several years under the mistaken belief that the well and attachments were upon its own land, and it was held that the company could remove the pump and boiler without paying the owner of the land therefor, for the reason assigned, that the improvements did not and were not intended to benefit the realty, and that they were placed there solely for the purpose of better operating its railroad.

¹⁰⁷ *Kimball v. Adams*, 52 Wis. 554; *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556.

In *Huebachmann v. McHenry*, 29 Wis. 655, where one erected a

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parties, or where the annexation of the chattel is with the knowledge and without the objection of the owner of the realty, the rule is that a license to remove the chattel will be implied, and the chattel, in consequence, will remain personalty.¹⁰⁸ Likewise, where the annexation of a chattel is caused through the fraud of the owner of the realty, the chattel does not become an irremovable fixture;¹⁰⁹ but a chattel annexed through mistake does not retain its character of personalty on account of the fraud of a supposed owner of the realty.¹¹⁰

building on land in good faith under a lease from one claiming a tax title to the land, and representing that the builder could remove the building, it was held that the building was a part of the realty.

¹⁰⁸ In *Lowenberg v. Bernd*, 47 Mo. 297, it was held that, where one erects a building or fence on the land of an adjoining owner under a mistake, shared in by the other, as to the proper division line, and with the knowledge of, and without objection from, the other, he may remove the fixture, on the theory that the erection was under a license.

In *Hines v. Ament*, 43 Mo. 298, a person placed his fence upon another's land by mistake, and allowed it to remain there by consent of the owner for fifteen years. The owner of the realty finally ordered it to be removed, and shortly afterwards carried it away himself. The fence was held to be personalty. So, in *Matson v. Calhoun*, 44 Mo. 368, a rail fence was constructed by mistake upon the land of another with the license of the owner, and it was determined to be personalty.

In *Brown v. Baldwin*, 121 Mo. 126, where, pending a dispute as to the title to land, portable machinery was placed thereon by one of the claimants with the acquiescence of the other, the latter could not claim it as a part of the freehold.

¹⁰⁹ *Matson v. Calhoun*, 44 Mo. 368.

¹¹⁰ In *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446, it was held that where, under a contract with the husband, the plaintiff placed a gas-manufacturing machine in the house of a married woman, supposing the house to belong to the husband, the machine

Statutory provisions in many of the states providing for compensation in cases where valuable improvements have been made by *bona fide* occupants of lands holding under a mistaken belief as to their title have somewhat modified the general rules above stated.¹¹¹

— (g) **The manner of annexation—How far conclusive.**

As a test in determining the character of a chattel annexed to the freehold, the fact of annexation has always been an important factor. In the early history of fixtures, the manner of annexation of a chattel to the freehold was a conclusive test as to its character of personalty or realty; but as the law developed, the intention of the parties came to be regarded as the important consideration, *i. e.*, the legal intention, as ascertained from the character of the chattel, the mode of its annexation, its adaptability to the use of the freehold, the purpose of its annexation, and the relation of the parties. The courts are not entirely in harmony as to the effect to be given to the different tests, although it is generally conceded that, in determining the character of a chattel, the following elements are to be considered: (1) The character of the chattel; (2) the mode of annexation; (3) the adaptability of the chattel to the use of the freehold; (4) the purpose to which it is put; (5) the intent of the parties.¹¹² In regard to the first element, this has been discussed

became a part of the realty, and hence the plaintiff could not recover it on rescinding the contract for the husband's fraud.

¹¹¹ Consult the statutes of the different states under the title "Improvements." See, also, 16 Am. & Eng. Enc. Law (2d Ed.) p. 62 et seq., "Improvements."

¹¹² The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty or something ap- (86)

before under the head, "As to the Nature of the Chattel or Thing Itself;" the generally conceded rule being that the chattel must, first of all, be one that is capable of maintaining a

purtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) the intention of the party making the annexation to make a permanent accession to the freehold,—*Langston v. State*, 96 Ala. 44, 11 So. 334; *Kaestner v. Day*, 65 Ill. App. 623; *Dana v. Burke*, 62 N. H. 627; *McMillan v. Fish*, 29 N. J. Eq. 610; *Voorhees v. McGinnis*, 48 N. Y. 278; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Phoenix Mills v. Miller*, 4 N. Y. St. Rep. 787; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Justice v. Nesquehoning Val. R. Co.*, 87 Pa. 28; *McLean v. Palmer*, 2 Kulp (Pa.) 349; *Hillard Live Stock Co. v. Amity Coal Co.*, 2 Lanc. Law Rev. (Pa.) 241; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286. But this criterion is subject to the qualification that the rights of the parties are liable to be controlled by an established custom or special agreement of the parties. *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

To transmute chattels into realty it must appear, first, that the chattels were actually annexed to the real estate, or something appurtenant thereto; second, that they were applied to the use or purpose to which that part of the realty to which they were connected was appropriated; third, that they were annexed with the intention to make a permanent accession to the freehold. *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; *Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140; *Temple Co. v. Penn. Mut. Life Ins. Co.* (N. J. Law; 1903) 54 Atl. 295.

Courts now very generally discard the old test of the physical character of the annexation, and hold that a chattel is not merged in the realty unless (1) it is physically annexed, at least by juxtaposition, to the realty, or some appurtenance thereof; (2) it is adapted to and usable with that part of the realty to which it is annexed; and (3) it was so annexed with the intention, on the part of the person making the annexation, to make it a permanent accession to the realty. *Emory, J.*, in *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940. See, also, *Readfield T. & T. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047.

In *Brownell v. Fuller*, 60 Neb. 558, 83 N. W. 671, it is stated:

separate existence of its own before and after annexation, and, if removable, according to many cases, to be so removed as not to change its integral character.¹¹³ As to the mode of annexation, the question of what constitutes an annexation has been considered under annexation.¹¹⁴ To constitute a fixture at all, there must be an annexation. The degree and manner of annexation is a test applied by the courts, generally, in determining whether a fixture is removable or not. Some states give to this test a very conclusive effect;¹¹⁵ others regard it only as one of the many tests applied,¹¹⁶

“‘Ordinarily, the requisites of a fixture are (1) actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold, this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made;’” citing *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829; *Freeman v. Lynch*, 8 Neb. 192; *Teaff v. Hewitt*, 1 Ohio St. 511; *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. 148.

“Whether an annexation is a removable fixture, or a permanent and immovable part of the realty, is largely a question of fact, depending upon the nature of the article annexed, the relation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation was made.” *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 160.

¹¹³ See ante, § 17, as to the nature of the chattel or thing itself.

¹¹⁴ See ante, § 18, as to the annexation.

¹¹⁵ See ante, notes 70, 71; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 90; *McKiernan v. Hesse*, 51 Cal. 594; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Guthrie v. Jones*, 108 Mass. 192; *De-graffenreid v. Scruggs*, 4 Humphreys (Tenn.) 451, 40 Am. Dec. 658; *Harris v. Haynes*, 34 Vt. 225; *Kendall v. Hathaway*, 67 Vt. 122.

¹¹⁶ In the case of *Wheeler v. Bedell*, 40 Mich. 696, *Campbell, C. J.*, (88)

the ultimate and real test being in fact the intention of the parties. By this is meant, not the secret intention of the parties, but their legal intention as shown from their relation, the character and mode of annexation of the chattel, and the purpose for which it was placed.¹¹⁷ In this respect, many cases consider the mode of annexation as the sole factor, without reference to other considerations, in determining the intent of the parties.¹¹⁸ This is particularly

said: "It has been held by this court that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned." Michigan cases cited.

¹¹⁷ In *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, Knowlton, J., said: "It should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose, and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible." See, also, *Teaff v. Hewitt*, 1 Ohio St. 511; *Dooley v. Crist*, 25 Ill. 551; *Brownell v. Fuller*, 60 Neb. 558, 83 N. W. 669. The intention of the parties has much to do with the question whether certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts. *Arnold v. Crowder*, 81 Ill. 56; *Fifield v. Farmers' Nat. Bank*, 47 Ill. App. 122.

¹¹⁸ In *McKiernan v. Hesse*, 51 Cal. 594, where a saw-mill plant was installed upon realty, it was held that the boilers and engines, being attached to the freehold, were irremovable fixtures, but the machinery and other appurtenances of the plant that had been temporarily severed and placed in a storehouse near by were removable.

So, in *Guthrie v. Jones*, 108 Mass. 192, counters affixed to a building were held to be a part thereof, but a glass case, drawers, and gas fixtures, though fastened to the walls, were held to be not so

so in ascertaining the character of engines and boilers fastened to the freehold.¹¹⁹ The better weight of judicial opinion, especially in the later decisions, seems to regard this test only as a factor in determining the intention of the parties, and, in fact, rather unimportant as compared with the test of the purpose of annexation, or the adaptability of the chattel to the use of the freehold.¹²⁰ In *Strickland v. Par-*

annexed as to become a part of the freehold. See *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745.

In *Degraffenreid v. Scruggs*, 4 Humph. (Tenn.) 451, 40 Am. Dec. 658, Green, J., said: "In this case the gin was erected in the gin-house, and fastened to the house by nails and braces. It was therefore permanently attached and fixed to the freehold, and this is the true and certain criterion to determine whether it passed by the deed with the freehold."

¹¹⁹ *Kaestner v. Day*, 65 Ill. App. 623; *Coleman v. Stearns Mfg. Co.*, 38 Mich. 30; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159; *Dutro v. Kennedy*, 9 Mont. 101; *Scheifele v. Schmitz*, 42 N. J. Eq. 700.

¹²⁰ See 13 Am. & Eng. Enc. Law (2d Ed.) p. 606.

In *Green v. Phillips*, 26 Grat. (Va.) 752, 21 Am. Rep. 323, Christian, J., said: "The true criterion of a fixture is the united application of the following requisites: Annexation to the realty, or something appurtenant thereto; application to the use or purpose to which that part of the realty with which it is connected is appropriated; the intention of the party making the annexation to make a permanent accession to the freehold. It is true that many cases may be found which hold that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly attached to the real estate that the connection cannot be severed without breaking or otherwise injuring the freehold; but the general course of modern decision, both in England and the American courts, is against adopting, as the criterion for determining the character of chattels as fixtures, whether the annexation to the realty be slight and temporary, or immovable and permanent, and in favor of declaring everything a fixture which has been attached to the realty with a view to the purposes for which it is held or

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ker, Kent, J., says: "The fact of actual and permanent annexation of the thing, personal in its nature, * * * was formerly regarded as essential; but this has been found to be unsatisfactory, and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test. * * * It is the permanent and habitual annexation, and not the manner of the fastening, that determines when personal property becomes a part of the realty."¹²¹ So, in *Despatch Line of Packets v. Bellamy Mfg. Co.*, Parker, C. J., says: "Some of the excepted cases seem to have made the question depend upon the character of the fastening,—whether slight or otherwise; but this is a criterion of a questionable character, not sustained by the weight of the decisions. More depends upon the nature of the article and its use as connected with the use of the freehold."¹²²

§ 19. Adaptation to the use of the freehold.

The criterion of annexation, as a sole test, in determining the character of a chattel, or as a test in arriving at the intention of the parties, early became inadequate. The question whether a chattel is annexed or not is often exceedingly dubitable, and one wherein many fine distinctions may be drawn. With this as a sole test, it is necessary to consider every chattel a fixture that is affixed in the slightest degree. But this is plainly inefficient, for the reason that there are many cases, especially in respect to machinery, where there is employed, however slight or temporary the connection between them."

¹²¹ *Strickland v. Parker*, 54 Me. 265.

¹²² *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

little or no fastening of the chattel to the freehold, as where light machinery is connected by belting in a mill, or where a bucket is hung in a well. So, where the essential parts of some machine are temporarily severed for purposes of repair, or where there are duplicate sets not attached, but adapted to the use of the realty, in these cases the test of annexation would prove fruitless and abortive in arriving at the true character of the chattel. Hence there has arisen another test,—that of adaptation of the chattel to the use of the freehold,—which, in recent years, has been frequently applied. Pennsylvania, perhaps, has given this test its strongest effect by treating it, in some cases, as an only consideration in determining the character of a chattel;¹²³ but,

¹²³ In *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490, wherein trover is brought for one hundred and six iron rolls of an iron rolling mill, which are not attached, but lying loose in and about the mill, it is distinctly affirmed that the test of physical annexation is inadequate, and that the proper test is the use or purpose to which the chattel is devoted. The court says: "If physical annexation were the criterion in regard to such things, the slightest tack or ligament ought to constitute it; else, if we were to get away from it even ever so little, we should have no criterion at all. There are so many fashions, methods, and means of it, and so many degrees of connection between material substances, that there is nothing about which men would more readily differ than whether a thing held by a band or cleat were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the results of the decisions professedly regulated by it. * * * The inherent imperfections of the rule required so many exceptions to it, in order to avoid absurdity and injustice in its application, that it has almost ceased to be a rule at all." The court further states: "Whether fast or loose, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold." See, also, *Carey v. Bright*, 58 Pa. 85; *Hill v. Sewald*, 53

as a sole test, it is equally as ineffective as the test of annexation, for the reason that there are many articles of furniture and others of a purely personal nature which are useful, convenient, and adapted to the pursuit of a particular trade or business, yet they can in no way be classed as fixtures.¹²⁴ And the same might be said in respect to domestic animals and the necessary utensils of a farm.

The term "adaptation"¹²⁵ to the use of the freehold" is not freely defined by the courts or text writers;¹²⁶ most of the cases are quite content to state it as one of the tests or requirements of a fixture.¹²⁷ It seems, however, that the

Pa. 274; *Overton v. Williston*, 31 Pa. 158; *Christian v. Dripps*, 28 Pa. 271; *Morris' Appeal*, 88 Pa. 368.

Whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such, and without which it would not be an ore bank equipped and ready for use, is a part of the freehold, and passes with the realty. *Ege v. Kille*, 84 Pa. 333.

In *Triplett v. Mays*, 13 Ky. Law Rep. 874, it is laid down that whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their nature and adaptation to the purposes for which they are used.

¹²⁴ *Park v. Baker*, 7 Allen (Mass.) 78.

¹²⁵ Some courts use a different term to express the same meaning. "Appropriation" is the word used in *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; "appropriateness" is the term in *Brennan v. Whitaker*, 15 Ohio St. 446; "fitness" is the characterization in *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

¹²⁶ In *Ferard's* time it does not seem to have reached the dignity of an individual test. Accordingly, in his work on Fixtures, it is treated incidentally in connection with the other tests. *Ewell* takes it under consideration with the topic of "constructive annexation," wherein he considers it as an element in arriving at the intention of the parties. See his work on Fixtures, page 21 et seq. *Tyler*, however, treats it as an independent test, and has well collated the cases on this topic. See his work on Fixtures, page 100 et seq.

¹²⁷ *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Rogers v.*

term comprehends the peculiar fitness of the chattel to the use of the freehold, and the devotion to the special use for which it is adapted and only fitted. Within the meaning of the term is also included the fact that the chattel is necessary to the complete use of the freehold, or is a necessary part of some whole which is a part of the realty. This application arises most frequently where machinery is placed in a mill or manufactory for a special purpose or end, and is particularly and specially fitted for that purpose.¹²⁸ In

Prattville Mfg. Co. No. 1, 81 Ala. 483, 60 Am. Rep. 171; Choate v. Kimball, 56 Ark. 55; Bemis v. First Nat. Bank, 63 Ark. 625; Hacker v. Munroe, 176 Ill. 384; Binkley v. Forkner, 117 Ind. 180; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. (Ky.) 361; Donnewald v. Turner Real-Estate Co., 44 Mo. App. 350; Goodin v. Elleardsville Hall Ass'n, 5 Mo. App. 289; Blancke v. Rogers, 26 N. J. Eq. 563; Brearley v. Cox, 24 N. J. Law, 289; Feder v. Van Winkle, 53 N. J. Eq. 370; General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Rogers v. Brokaw, 25 N. J. Eq. 496; Speiden v. Parker, 46 N. J. Eq. 292; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 324, 13 Am. Rep. 595; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Voorhees v. McGinnis, 48 N. Y. 278; Freeman v. Lynch, 8 Neb. 192; Oliver v. Lansing, 59 Neb. 219, 80 N. W. 829; Brownell v. Fuller, 60 Neb. 558, 83 N. W. 669; Wheeler v. Bedell, 40 Mich. 693; Pond & Hasey Co. v. O'Connor, 70 Minn. 266, 73 N. W. 159; Helm v. Gilroy, 20 Or. 517; Henkle v. Dillon, 15 Or. 610; Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286; Jones v. Bull, 85 Tex. 136; Keating Implement & Mach. Co. v. Marshall Electric Light & Power Co., 74 Tex. 605; Taylor v. Collins, 51 Wis. 123; Walker v. Grand Rapids Flouring Mill Co., 70 Wis. 92.

¹²⁸ In the case of Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368, the court said: "In general terms, we think it may be said that when a building is erected as a mill, and the waterworks or steamworks which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment, or mortgage

such cases, that adaptation of the chattel shows the intent to make it an irremovable fixture. So, where pieces of machinery, in themselves unattached and personal, are necessary and adapted to the use of the realty or whole machinery with which they are connected, they are a part of the realty;¹²⁹ and this is so, even though the parts are duplicate parts, and at the time are really not in use in connection with the realty.¹³⁰ Where, however, the chattel is adaptable to use elsewhere in a similar place and manner, this is strong proof tending to show that the chattels annexed retain their character of personalty.¹³¹ This test

attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage, or attachment."

Where machinery affixed to a manufacturing building is permanent in its character, and essential to the purpose for which the place is occupied, it is to be regarded as realty, even though it may be severed without injury to it or the building. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

In *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86, it was held that a factory bell and a blower pipe used for conveying air from a blower to a forge were parts of the realty, since they were attached for the purposes of the factory, and it would be useless without them.

¹²⁹ In *Dudley v. Hurst*, 67 Md. 44, the court says: "Where, in the case of machinery, the principal part becomes a fixture by actual annexation to the soil, such part of it as may be not so physically annexed, but which, if removed, would leave the principal thing unfit for use, and would not of itself, and standing alone, be well adapted for general use elsewhere, is considered constructively annexed." See *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Howell Mills v. Taunton Sav. Bank*, 150 Mass. 519; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 214.

¹³⁰ *Ege v. Kille*, 84 Pa. 333; *Ex parte Astbury*, 4 Ch. App. 630; *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452.

¹³¹ *Equitable Trust Co. v. Christ*, 47 Fed. 756; *Cherry v. Arthur*,

of adaptation has been applied to the rolling stock of a railroad on the ground that the cars are a necessary part of the entire establishment, the wheels being fitted to the rails, and peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose.¹³² This is the reasoning of the court in *Farmers' Loan & Trust Co. v. Hendrickson*,¹³³ but perhaps the better weight of opinion, in accordance with this same test, regard rolling stock as personalty, for the reason that the cars, in these days, are capable of use elsewhere, and that, therefore, this want of the element of localization in use is conclusive under the test.¹³⁴

§ 20. Purpose to which the chattel is put.

The purpose to which a chattel is put in connection with its use upon the realty is important in determining its character as an irremovable fixture or otherwise. The fact that there is an affinity between the article devoted to the freehold and the use of the freehold, and that the chattel itself is specially annexed for the purpose of use in connection with the realty, are circumstances of some moment in ascertaining the character of the chattel as personalty or

5 Wash. 787; *Carpenter v. Walker*, 140 Mass. 416; *Maguire v. Park*, 140 Mass. 21; *Green v. Phillips*, 26 Grat. (Va.) 752; *Feder v. Van Winkle*, 53 N. J. Eq. 370.

¹³² In a local way, this principle has been applied in a case where small cars were used in a brickyard in connection with a drier, on which bricks were loaded, and there kept until the drying process was complete. The cars, being indispensable to the use of the drier, were held to be a part of the realty. *Curran v. Smith*, 37 Ill. App. 69.

¹³³ *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484.

¹³⁴ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314.

realty.¹³⁵ This purpose is shown in many ways. The fact that the addition of a chattel to the realty is made with the express purpose of improving that realty is regarded as a material consideration in fixing its character. This is evident in the agricultural cases, where houses, barns, other buildings, and improvements are placed upon farms for the manifest purpose of improving the farms. In all these cases, ordinarily, the erections become a part of the realty.¹³⁶ So, where particular kinds of buildings and mills are erected for use in connection with the realty.¹³⁷ Articles that are

¹³⁵ The following cases show the idea of this test in emphasizing the purpose to which the chattel is devoted as a means of clearly showing the real intention of the parties: *Hill v. Mundy*, 89 Ky. 36; *Triplett v. Mays*, 13 Ky. Law Rep. 874; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744; *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221; *Hill v. Wentworth*, 28 Vt. 428; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542.

¹³⁶ It is not the mere fastening that is so much to be regarded, as the nature of the thing, its adaptation to the uses and purposes for which and to which the building is erected or appropriated. *Farrar v. Stackpole*, 6 Me. 154; *Corliss v. McLagin*, 29 Me. 115.

Statuary used for the improvement of the realty is a part thereof. *Snedeker v. Warring*, 12 N. Y. 170.

Fences used for the betterment of the realty are, likewise, a part of the realty. *Mitchell v. Billingsley*, 17 Ala. 393; *Smith v. Carroll*, 4 G. Greene (Iowa) 146; *Kimball v. Adams*, 52 Wis. 554.

See note on fences under constructive annexation, ante, 60.

¹³⁷ In *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780, the erection of a cider mill on a farm whereon there was an orchard was considered to be for the improvement of the realty.

So, in the case of *Davis v. Mugan*, 56 Mo. App. 311, the fact that a stone mill was erected upon land where there was an inexhaustible supply of stone showed an apparent purpose of making it a permanent annexation.

essential to the use and enjoyment of the realty, and without which it is incomplete, are a part of the realty.¹³⁸ Likewise, whatever is accessory to a building for the more convenient use and improvement of the building is an irremovable fixture. Thus, articles placed in a mill by the owner to carry out the obvious purpose for which it was erected are generally a part of the realty, notwithstanding the fact that they could be removed and used elsewhere.¹³⁹ So, apparatus for the manufacture of gas and gas burners has been treated as accessories to a building.¹⁴⁰ But gas fixtures generally are held to be mere articles of furniture, and the fact that they are fastened to the wall for safety or convenience does not deprive them of their character as personal chattels.¹⁴¹

—— (a) **As applied to machinery.**

This test comes into application most frequently in respect to machinery which has been especially fitted or manufactured and placed in a plant adapted for its use. In all such cases, machinery which is accessory to the realty, and

¹³⁸ *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 255; *Parsons v. Copeland*, 38 Me. 537.

¹³⁹ *Parsons v. Copeland*, 38 Me. 537.

¹⁴⁰ *Hays v. Doane*, 11 N. J. Eq. 84; *Keeler v. Keeler*, 31 N. J. Eq. 191.

¹⁴¹ *Guthrie v. Jones*, 108 Mass. 193.

In *Vaughen v. Haldeman*, 33 Pa. 523, the court says: "Lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses by means of candles, oil, or other fluids, have never been considered as fixtures, and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures."

which is necessary for the full enjoyment of the same, is a part thereof. The true rule in this connection, as laid down by the supreme court of Virginia, seems to be that when the machinery is permanent in its character, and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purpose for which the building is used will be considered as an irremovable fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either.¹⁴²

— (b) Distinction between machinery accessory to the business and machinery accessory to the realty.

But the distinction must be drawn between articles that are accessory to the business and those that are accessory to the realty. In *Fortman v. Goepper*,¹⁴³ the court says: "The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises and the premises or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal, to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever

¹⁴² *Green v. Phillips*, 26 Grat. (Va.) 752; *Shelton v. Ficklin*, 32 Grat. (Va.) 735; approved in *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 255.

¹⁴³ *Fortman v. Goepper*, 14 Ohio St. 567.

business may be carried on upon it, and not peculiarly for the benefit of a present business, which may be of temporary duration, become subservient to the realty, and acquire and retain its legal character.”¹⁴⁴ Hence, there is a general tendency to hold, as a part of the realty, all that machinery which in its nature is adapted to a particular plant, and which is not susceptible to change elsewhere, and subject to be moved in accordance with the exigencies of a particular business. Under this head is included machinery of the more stable and heavier type, such as boilers, engines, shafting, and heavy pieces of other machinery.¹⁴⁵

¹⁴⁴ *Fortman v. Goepper*, 14 Ohio St. 558, quoted in *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770.

In the case of *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 255, wherein the running gear of a cotton gin was held to be a part of the realty, the principle is laid down by the court that whatsoever is erected upon land as a means of enjoying it is a fixture; but whatever is intended for the purpose of carrying on a trade which has no necessary connection with the use of the land is a mere chattel. See, also, *Fairis v. Walker*, 1 Bailey (S. C.) 540; *McDaniel v. Moody*, 3 Stew. (Ala.) 314; *Latham v. Blakely*, 70 N. C. 368; *McKenna v. Hammond*, 3 Hill (S. C.) 331, 30 Am. Dec. 366.

¹⁴⁵ In *Roddy v. Brick*, 42 N. J. Eq. 225, Bird, V. C., said: “It would seem that when a building is erected for a particular purpose, and machinery is placed therein to effectuate that purpose, and is reasonably necessary therefor, and is in some substantial manner attached to the land or building, and consequently to the freehold, so as to give one the idea of permanency, and to evince an intention of making a fixture of it, the courts incline to regard such machinery as part of the realty, irrespective of weight or size, unless the size be such that the machine cannot be removed without removing or damaging the building.”

In *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101, electrical apparatus placed in an electric power plant which was especially designed to receive the same, and the whole

But where machinery is merely incidental to the carrying on of a particular business, and is of such a character that it can be used in one place as well as in another, the fact that it is necessary and advantageous to the business conducted upon the realty does not thereby give the articles the character of realty.¹⁴⁶ In this class is included general

purpose of which would be frustrated without it, was held to be a part of the realty.

So, in *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166, machinery for a shoe factory used for the purpose of manufacturing shoes, and being essential to the maintenance of the plant, was a part of the realty.

¹⁴⁶ In *Rogers v. Brokaw*, 25 N. J. Eq. 496, the court said: "Movable machines like these, whose number and permanency are contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require, are different in nature and legal character from the steam engine, boilers, shafting, and other articles secured by masonry or other substantial annexation, designed to be permanent, and indispensable to the enjoyment of the freehold."

So, in *Saunders v. Stallings*, 52 Tenn. (5 Heisk.) 65, machinery that was placed on the land for the purpose of trade and manufacture, and not to add to the permanent value of the land, or to be permanently attached to the soil, did not become a part of the realty.

Machines not essential to the enjoyment and use of a building occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is to steady them for use, and not to make them a permanent part of, or adjunct to, the building. *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12. See *Pope v. Jackson*, 65 Me. 162; *Hawkins v. Hersey*, 86 Me. 396; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639. Thus, loose and portable articles, such as wheelbarrows, crowbars, shovels, oil tanks, loose planks and lumber, used in a paving-brick plant, adapted to general use, and capable of use elsewhere in any like establishment, are not fixtures. *Hillebrand v. Nelson* (Neb.; 1901) 95 N. W. 1068. See, also, *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Winslow v.*

machinery of an asportable nature, and suitable to various applications. Articles that are annexed merely for convenience in use do not become a part of the realty, the annexation being considered to be for the benefit of the machinery, and for the benefit of the realty.¹⁴⁷ The distinction drawn between machinery which is accessory to the realty and that which is accessory to the business has been brought to bear upon machinery which furnishes the motive power of a plant, and that machinery which is a passive agent in the plant, the former being determined, in accordance with this distinction, to be a part of the realty; the latter, not.¹⁴⁸ This distinction, however, is rather artificial, and is often contradicted. After all, in accordance with the weight of modern cases, the real test of a fixture is the intention of the parties, so that this, therefore, is a subor-

Bromich, 54 Kan. 300, 38 Pac. 275, 45 Am. St. Rep. 285; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

¹⁴⁷ Carpenter v. Walker, 140 Mass. 416; Long v. Cockern, 128 Ill. 29; Taylor v. Watkins, 62 Ind. 511; Shepard v. Blossom, 66 Minn. 421; Blancke v. Rogers, 26 N. J. Eq. 563; Murdock v. Gifford, 18 N. Y. 28; Cherry v. Arthur, 5 Wash. 787.

In Rahway Sav. Inst. v. Irving Street Baptist Church, 36 N. J. Eq. 61, the court said: "It cannot be held that the mere fact that a chattel is placed in a part of the house which has been adapted to receive it will make it a fixture; for example, a bedstead in a house obviously would not be made a fixture by the mere fact that it was placed in an alcove made to receive a bedstead. And so, too, the mere fact that a stove or portable furnace is placed in a niche made to receive a stove, or is set in a depression or pit or other place in a floor made to receive a stove or portable furnace, will not make such stove or furnace a fixture."

¹⁴⁸ Powell v. Monson & Brimfield Mfg. Co., 3 Mason, 466, Fed. Cas. No. 11,357; Hill v. Wentworth, 28 Vt. 428; Harris v. Haynes, 34 Vt. 220; Case Mfg. Co. v. Garven, 45 Ohio St. 299; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

dinate test, to which no conclusive principles can be applied, but must be taken into consideration along with the other tests, from whose combined application the real intention of the parties may be drawn.

§ 21. Intention—Its importance.

The intention with which a chattel is used in connection with the realty has become, in modern cases, a test of primary consideration. It is in fact recognized as the ultimate test, and conclusive in determining the character of a chattel as realty or personalty. The courts are not, all of them, in harmony as to the methods to be employed in ascertaining this intention, and as to the relative importance to be given to the other tests; but there is a general unanimity of judicial opinion, treating intention as the essential element in determining a fixture.¹⁴⁹ There are, however, a

¹⁴⁹ The case of *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, is one of the great authorities on the law of fixtures, and the tests laid down in it are followed and acquiesced in by the majority of the courts of the United States. The court in that case asserts the following elements as necessary to make a chattel a part of the realty: (1) Actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

"It may be stated that whether a thing which may be a fixture becomes a part of the realty by annexing it depends, as a general proposition, upon the intention with which it was done." 1 Washburn, Real Property, p. 8.

"The modern and most approved rule appears to be to give special

few states that cling still to the old test of physical annexation as the conclusive test, but they are among the constantly waning minority.¹⁵⁰

— (a) What meant by.

The apparent lack of harmony in the cases to the improminence to the intention of the party making the annexation. *Readfield T. & T. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047. See, also, *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940.

It is now well settled in this state that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties. *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *Crippen v. Morrison*, 13 Mich. 23; *Robertson v. Corsett*, 39 Mich. 777; *Wheeler v. Bedell*, 40 Mich. 693; *Ferris v. Quimby*, 41 Mich. 202, 2 N. W. 9; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Stevens v. Roe*, 69 Mich. 259, 37 N. W. 205.

"In *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, the court recognized the united application of the following requisites to be the true criterion in testing whether an article is a fixture: (1) Actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; (3) the intention of the party making the annexation to make a permanent accession to the freehold. The intention was treated in that case as a matter of paramount importance, and this seems to be the modern rule, but the first and second requisites were by no means dispensed with. Annexation is the *sine qua non* of an article in order that it be a fixture; but it has long been recognized, as in the above case, that a physical attachment with the realty is not always essential." *Ladd, J., in Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789.

"It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. * * * Of the various circumstances which may determine whether, in any case, this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not, by annexation, become a part of the freehold, as a general rule, they will not." *Tift v. Horton*, 53 N. Y. 377.

¹⁵⁰ *Wade v. Johnston*, 25 Ga. 331. See notes 70, 71, c. 3, ante.

portance of the test of intention may be explained, in part, by the various conceptions entertained by the courts of the meaning of "intention." Many of the courts have treated it as more or less of a concrete test, depending greatly for its ascertainment upon the mental intent of the parties concerned anent the chattel used in connection with the freehold.¹⁵¹ Thus, in *Sword v. Low*,¹⁵² the court states that if a chattel be removable without material injury to the freehold, the intention of the parties will control, apparently having in mind the individual intention of the parties. So, in *Tillman v. De Lacy*,¹⁵³ it was held that a chattel per-

¹⁵¹ *Sword v. Low*, 122 Ill. 487. The syllabus there states that while parties may not, by contract, make personal property real or personal at will, yet, when an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern.

See *Kelly v. Austin*, 46 Ill. 156, where the court said that, while the intention alone will not always determine whether such structures as were there being considered are or are not to be regarded as realty, it will have a controlling influence in cases of doubt. See, also, *Dooley v. Crist*, 25 Ill. 551; *Smith v. Moore*, 26 Ill. 392; *Arnold v. Crowder*, 81 Ill. 56; *Hacker v. Munroe*, 176 Ill. 384.

So, in *Padgett v. Cleveland*, 33 S. C. 347, it was held that if the mode and extent of the annexation of the chattels to the realty did not determine its character, the intention of the parties relative thereto should be considered.

Likewise, in *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903, the intention of the parties as between vendor and vendee was considered immaterial.

¹⁵² *Sword v. Low*, 122 Ill. 487. In this case the court failed to distinguish between the test of intention and the right of the parties, by express agreement, to fix the character of a chattel.

¹⁵³ *Tillman v. De Lacy*, 80 Ala. 103. But see *De Lacy v. Tillman*, 83 Ala. 155, where the test of intention is more properly characterized.

manently annexed to the freehold, and not removable without material injury to the realty, was a part of the realty, irrespective of the intention with which it was annexed, again treating intention as the mental act of the parties involved. Likewise, in a Michigan case¹⁵⁴ it is stated that intent chiefly determines whether a chattel annexed to the realty for use becomes a part of it where it is not shown that it was especially adapted for use there, or that the freehold is injured by its annexation and removal. So, in a Nevada case,¹⁵⁵ the test of intention was denied, the court having in mind, undoubtedly, the mental intention of the parties, which in this case was undisclosed. Again, in a Minnesota case, it is distinctly asserted that, in the absence of an annexation, either actual or constructive, intent alone will not convert a chattel into a fixture.¹⁵⁶

But intention must be considered in two phases in order to harmonize the cases and understand the principles laid down by the various courts: First. There is the mental intention of the parties, which is purely personal, psychological and a question of fact. When properly exercised, it is a great factor in determining the character of a chattel in connection with the other tests mentioned. Second. But

¹⁵⁴ *Ferris v. Quimby*, 41 Mich. 202.

¹⁵⁵ *Treadway v. Sharon*, 7 Nev. 37.

¹⁵⁶ *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221. In this case a mortgagor constructed certain buildings, and placed therein machinery, part of the same being physically attached, a part being so ponderous as to constitute annexation by gravity, and the rest being lighter, and connected with the building only by belts. It was held that, even though there was an intention to make all the machinery a part of the realty, yet only that part which was annexed so became.

intention, when spoken of as an ultimate test, and the primary consideration in the law of fixtures, and when not dependent upon the individual conceptions of the parties concerned in the use of chattels upon the realty, is rather an abstract test, deducible, as a presumption of law, from the character of the chattel, its mode and manner of annexation to the freehold, its adaptability to the use of the freehold, and the purpose to which it is put, including, also, the mental intention of the owner of the chattel at the time of his making the annexation. All of these concrete tests make and constitute the legal intention. The test of the mental intention of the parties is a separate factor, along with the other tests mentioned, in inducing this legal intention. It is true that the courts make no such independent distinctions upon intention as here set forth. Nevertheless it can be gleaned from the cases that a broad distinction exists between what is known as the "legal intention" and the "mental intention" of the owner of the chattel, especially from the propositions laid down in the extreme cases, although it must be admitted that the courts generally take a middle ground on this matter by constantly using the term "intention" to mean, at one time, the legal intention, and, at another, the mental intention.

The law on this subject is fully and adequately stated in the case of *Hopewell Mills v. Taunton Sav. Bank*,¹⁵⁷ where

¹⁵⁷ *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 520, citing *Turner v. Wentworth*, 119 Mass. 459; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Allen v. Mooney*, 130 Mass. 155; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Hubbell v. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446; *Maguire v. Park*, 140 Mass. 21; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa,

Knowlton, J., said: "Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications, which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it, to promote the object for which it was erected, or to which it has been adapted and devoted,—an article intended not to be taken out or used elsewhere unless by reason of some unexpected change in the use of the building itself. The tendency of modern decisions is to make this a question of what was the intention with which the machine was put in place. * * * It should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles not merely his own rights, but the rights of others, who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention in reference to the relation of the machine to the real estate is properly imputable to him who put it in position. Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact; * * * but the principal facts, when stated, are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can decide the question. The nature of the

57; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Hill v. Farmers' & Mechanics' Nat. Bank*, 97 U. S. 450.

article, and the object, the effect, and the mode of its annexation, are all to be considered."

— (b) **How ascertained.**

Thus, this test of the legal intention is an inference deducible from the outward, open acts of the party using the chattel upon the realty, which give expression to his intent. The mental intention of the party has its influence, but only in connection with the other tests named in arriving at this legal intention. As stated in a recent case:^{157a} "It is not the unrevealed, secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct, and language of the parties,—the intention that should be inferred from all these. * * * Thus, where a plumber, as subcontractor, put plumbing material in a house in the course of its construction, it was held to be a necessary inference that he intended the materials to become a part of the realty. So, where the chattel is so annexed that it cannot be removed without material injury to the realty, it would ordinarily be a necessary inference that the intention was not to remove it. So, where the chattel is annexed by a stranger having no interest nor right of occupancy in the realty, he would ordinarily not be heard to say that he intended a trespass. So, a special agreement or a known custom may conclusively determine the question." But a mere expressed intent to convert a chattel into a fixture, without an outward act expressive thereof, has

^{157a} Emery, J., in *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940. See, also, *Readfield T. & T. Co. v. Cyr*, 95 Me. 287, 49 Atl. 1047; *Munroe v. Armstrong*, 179 Mass. 165, 60 N. E. 475; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 62 N. J. Eq. 624, 50 Atl. 459.

no influence. Thus, it has been held that the quarrying of a stone, and the bringing of it from a distance, with the intention to make it a part of the realty by fitting it as a doorstep to a house, did not make it a part of the realty.¹⁵⁸ And so a steam engine and other machinery that have been brought upon the realty with the evident and manifest intention of making them a part of the realty, but which are, as yet, unfastened, remain personal property.¹⁵⁹ Yet there are cases to the contrary, asserting that the bringing of a chattel upon the realty with the immediate intention of annexation makes it a part of the realty.¹⁶⁰ But even then there must be apparent such expressive acts as show an immediate intention on the part of the party annexing to make the chattel a part of the realty. Thus, the bringing upon the realty of rails wherewith to construct a fence, and of lumber out of which to erect a house, at some indefinite time in the future, will not make the articles a part of the freehold.¹⁶¹

It must be conceded that many of the late cases give to an expressed mental intent of the party annexing the chattel a strong conclusive effect as evidence in ascertaining the legal

¹⁵⁸ *Woodman v. Pease*, 17 N. H. 282.

¹⁵⁹ *Miller v. Wilson*, 71 Iowa, 610; *Buckout v. Swift*, 27 Cal. 433. Contra, *Patton v. Moore*, 16 W. Va. 428; *McFadden v. Crawford*, 36 W. Va. 671.

¹⁶⁰ *Ripley v. Paige*, 12 Vt. 353; *Conklin v. Parsons*, 2 Pin. (Wis.) 264; *McLaughlin v. Johnson*, 46 Ill. 163; *Hackett v. Amsden*, 57 Vt. 432; *Patton v. Moore*, 16 W. Va. 428; *McFadden v. Crawford*, 36 W. Va. 671. See ante, notes 60, 61.

¹⁶¹ *Robertson v. Phillips*, 3 G. Greene (Iowa) 220; *Harris v. Scovel*, 85 Mich. 32; *Thweat v. Stamps*, 67 Ala. 96; *Wing v. Gray*, 36 Vt. 261; *Carkin v. Babbitt*, 58 N. H. 579; *Peck v. Batchelder*, 40 Vt. 233; *Woodman v. Pease*, 17 N. H. 282. See ante, note 60.

intention. Its conclusive effect, however, is greatly varied according to the relations of the parties, and will be considered later under specific heads.¹⁶² The secret mental intention of the party, however, is immaterial and ineffective, either as a test or as evidence of any intention. "An unexpressed mental intention is a myth; it is intangible; it is subject to no law, and cannot be tried."¹⁶³ So, testimony on the part of the person annexing the chattel of an intention, at the time of the annexation of the chattel, that the chattel should remain personalty, such intention being secret and undisclosed, and not expressed by words or acts indicative of his purpose, is inadmissible.¹⁶⁴ The mental intention of a party, to be a factor in determining the character of a chattel, must plainly and affirmatively appear by words, circumstances, and acts that clearly indicate his intent,¹⁶⁵ and the party making the annexation must be in a position where he has the right to determine whether the chattel shall become a fixture or not;¹⁶⁶ for if, as between himself and his adversary claimant, he has no right to claim the property as a chattel or otherwise, an intention to do so, no matter how clearly and affirmatively expressed, will be of no avail. This is evident in cases where a party who is a trespasser, annexes chattels to the realty of a stranger, or

¹⁶² See post, c. 6, "Fixtures as between Landlord and Tenant"; c. 7, "Fixtures as between Grantor and Grantee"; c. 8, "Fixtures as between Mortgagor and Mortgagee," etc.

¹⁶³ *Tate v. Blackburne*, 48 Miss. 1.

¹⁶⁴ *Treadway v. Sharon*, 7 Nev. 37; *Kendall v. Hathaway*, 67 Vt. 122; *Snedeker v. Warring*, 12 N. Y. 174; *Crum v. Hill*, 40 Iowa, 506.

¹⁶⁵ *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 520; *Treadway v. Sharon*, 7 Nev. 37; *Tate v. Blackburne*, 48 Miss. 1.

¹⁶⁶ See ante, c. 3, "Annexation, by Whom Made"; post, § 26c.

where erections are made upon land where the title is in dispute, and also in cases where subsequent *bona fide* purchasers of the realty are involved.

— (c) Whose intention.

This mental intention must be that of the party making the annexation, who is at the same time the owner of the chattel, and, to have any effect in determining the character of a chattel, must not only be expressed and shown by acts indicative of the purpose intended, but it must relate to, and be contemporaneous with, the time of actual or constructive annexation of the chattel.¹⁶⁷ Thus, the manifestation of a specific intention to remove machinery that is not shown until it is necessary to do so in order to prevent the machinery from being seized under a real-estate mortgage is of no effect.¹⁶⁸ So, in *People v. Jones*,¹⁶⁹ the court says: "It is true the intent of the owner is often of controlling influence in determining whether a fixture is or is not a part of the real estate; but the intention must relate either to the time of annexation or to some actual or constructive severance."

— (d) How far conclusive.

Intention as an ultimate test, and treating it in its ab-

¹⁶⁷ *Hill v. Wentworth*, 28 Vt. 428.

¹⁶⁸ *Kendall v. Hathaway*, 67 Vt. 122.

¹⁶⁹ *People v. Jones*, 120 Mich. 283, 79 N. W. 177. In this case, where an engine was placed upon a brick foundation, and inclosed in a frame building, it was held that the testimony of the owner that he had in mind the removal of the engine did not show that he had formed the purpose to do so; much less that when the engine was annexed was there any intention of so treating it.

stract sense as a legal inference, is, of course, conclusive in determining a chattel as a part of the realty or otherwise, except where there is an express agreement between the parties as to the character of a chattel. The united application of the tests heretofore mentioned create it, and the inference resulting is the intention which classifies the chattel as realty or otherwise.

The mental intention of the party who is the owner, and the one making the annexation, is a test varying in its importance according to the relation of the parties concerned, and the character and mode of annexation of the chattel. It is clear that a mere mental intention, standing by itself, is not so effective as to convert a chattel into a part of the realty,¹⁷⁰—there must be some other element present to give it that effect;¹⁷¹ but when there is an actual or constructive annexation of the chattel to the realty, the mental intention with which it was annexed generally controls in determining the character of the chattel as realty or personalty.¹⁷² This is apparent where the law is applied in an attempt to make certain chattels a part of the

¹⁷⁰ Intent alone will not convert a chattel into a fixture. *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744.

¹⁷¹ Placing machinery in position in a building with the intention of making it a permanent part of the plant is not sufficient to make such machinery a part of the realty unless it is actually or constructively attached to the building or land. *Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works*, 35 Minn. 543, 29 N. W. 349. But a heater and range may be fixtures, although but slightly attached to the building, if put in by the owner of the realty with an intention to make them a part thereof. *Erdman v. Moore*, 58 N. J. Law, 445, 33 Atl. 958.

¹⁷² *Shepard v. Blossom* (1896) 66 Minn. 421, 69 N. W. 221. "There must be actual annexation, with an intention to make a permanent accession to the freehold, but it is not necessary that there be an in-

realty. Thus, in an Iowa case, it was held that the fact that shelving and counters were attached to a building by nailing, and were for the use of the premises as a store, did not settle their character as a part of the realty, but that it must first appear that it was the intention of the owner of the chattel property that it should become a part of the realty.¹⁷³ But in cases where there is a mental intention to treat the chattel annexed as personalty, and the chattel is so annexed that it cannot be removed without material injury to the realty, the intention will not control;¹⁷⁴ but this principle is not universally conceded.¹⁷⁵ So, where the chattel is especially adapted for use in connection with the particular freehold, the intention will not determine its character.¹⁷⁶

In general it may be stated that the mental intention of a party using a chattel in connection with the realty, as evinced from outward and open expressions and acts, is a controlling factor in establishing the legal intent in regard to a chattel, and is generally a question of fact for the jury.

tention to make the annexation perpetual. The intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts and circumstances as do not lead to, but repel, the inference that it is intended to be a temporary annexation." *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628.

¹⁷³ *Johnson v. Mosher* (1891) 82 Iowa, 29, 47 N. W. 996. See *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57.

¹⁷⁴ *Sword v. Low*, 122 Ill. 487; *Harris v. Haynes*, 34 Vt. 225; *Capital City Insurance Co. v. Caldwell*, 95 Ala. 90; *Tillman v. De Lacy*, 80 Ala. 103.

¹⁷⁵ *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83; *Padgett v. Cleveland*, 33 S. C. 347.

¹⁷⁶ *Ferris v. Quimby*, 41 Mich. 202.

CHAPTER IV.

SEVERANCE.

- § 22. What constitutes.
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- 25. As to prior mortgagees of the land.
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§ 22. What constitutes.

Generally, articles which have become realty by operation of the tests aforementioned, may become personalty again by a severance;¹ but the severance, to be effective, must be

¹ *Morgan v. Varick*, 8 Wend. (N. Y.) 587 (steam engine and boiler in grist mill, when severed personalty); *Gooding v. Riley*, 50 N. H. 400 (machinery in a mill); *State v. Goodnow*, 80 Mo. 271 (mill burned down; machinery removed and stored on other premises); *Pope v. Garrard*, 39 Ga. 471 (store destroyed by fire; counters and drawers removed; held personalty); *Franks v. Cravens*, 6 W. Va. 185 (engine and boiler in saw mill removed to other premises); *Padgett v. Cleveland*, 33 S. C. 339 (engine and boilers in factory).

Where a distillery was destroyed by fire, and the machinery thereof was burned, broken, and damaged, so as to be of no value except as old iron, and, after the fire, the land was sold to one purchasing with the intention to excavate and sell the sand therefrom, and then to use the land for building purposes, it was held that the old iron on the ground did not pass to the vendee. *Triplett v. Mays*, 13 Ky. Law Rep. 874. But old iron, formerly a part of a mill destroyed by fire, is not converted by the fire into personalty. In *re Preston's Estate*, 1 Chester Co. Rep. (Pa.) 517. See, also, *Warner v. Hitchins*, 5 Barb. (N. Y.) 666.

A sale of stones by the owner of a farm, accompanied by payment

by the act of the owner of the freehold.² The mere act of physical severance, however, is not always sufficient to convert the article annexed into personalty; an accidental severance or a disannexation made simply for the purpose of repair does not ordinarily deprive a fixture of its character as a part of the realty.³ There are, however, cases that assert that an effective severance may be made by act of God, as in the case of fire or flood, or *per vim venti*.⁴ But this prop-

for and removal of the same by the vendee to another part of the premises, constitutes a severance from the realty, and vests the title in the vendee. *Fulton v. Norton*, 64 Me. 410. But a stone sink, weighing two hundred pounds, is not severed by the removal of a pump, and the decay of a pipe connected therewith. *Bainway v. Cobb*, 99 Mass. 457.

Where one in adverse possession severs a tree or other article from the land, it becomes his. *Branch v. Morrison*, 51 N. C. 16.

² *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 696; *Dooley v. Crist*, 25 Ill. 551; *Docking v. Frazell*, 34 Kan. 29; *Lewis v. Rosler*, 16 W. Va. 333. However, in case of a tortious severance by a third party, the owner of the fixture may elect to treat the same as personalty. See post, c. 14, §§ 109b, 110b.

³ See post, notes 4, 5, § 24, "Temporary Severance."

⁴ *Pope v. Garrard*, 39 Ga. 471 (store destroyed by fire; counters and drawers removed; held personalty); *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Curry v. Schmidt*, 54 Mo. 515; *Triplett v. Mays*, 13 Ky. Law Rep. 874 (distillery destroyed by fire; old iron left held personalty).

In the case of *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90, where a house that was a part of the realty was carried away by a flood into the street a short distance, it was distinctly asserted that, no matter whether the severance was by act of God or man, the severance, *proprio vigore*, changed the character of the property from realty to personalty, irrespective of the means by which it was accomplished. Hence the house, by its removal, was not subject to a mortgage lien upon the lot where it originally stood. Followed by *Hill v. Gwin*, 51 Cal. 47.

So, in *State v. Goodnow*, 80 Mo. 271, where a mill was burned (116)

osition is denied in other courts, particularly in Pennsylvania, on the ground that such a holding is prejudicial to, and inconsistent with, the property rights of the owner of the realty.⁵ It appears that, in order to constitute an ef-

down, and the machinery removed and stored upon the premises, and afterwards sold, it was held that articles which are a part of the realty may lose their character as such as well by accident as by the act of the owner.

So, where a building was partly destroyed by fire, the bricks thus severed became personalty. *Meyers v. Schemp*, 67 Ill. 469.

⁵ But in the case of *Goddard v. Bolster*, 6 Greenl. (Me.) 427, 20 Am. Dec. 320, where a third party attached to and made a part of the realty his mill stones and mill irons, which subsequently were carried off by a freshet, and were afterwards collected and deposited by the roadside, it was held that the articles were still a part of the realty, and were not subject to seizure by the creditors of the third party.

So, in the case of *In re Preston's Estate*, 1 Chester Co. Rep. (Pa.) 517, old iron that was originally a part of the machinery of a mill which was destroyed by fire was not thereby converted into personal property, and not subject to the lien upon the realty. But in *Triplet v. Mays*, 13 Ky. Law Rep. 874, where a distillery was burned, and where the metal part of the machinery was thus broken, damaged, and disconnected from the ground, so as to be of no value except as old iron, and where, after the fire, the land was sold to one who intended to excavate and sell sand from it, and then use the land for building lots, it was held that the old iron on the ground did not pass to the vendee. And so, in *Meyers v. Schemp*, 67 Ill. 469, where a building was partly destroyed by fire, the bricks constituting the same became personalty. It will be noted in these last two cases that the articles, by the fire, lost their identity as fixtures.

Where a flood washes out of a mill the engine, boiler and mill irons, which are fixtures in the mill, they are not converted into personalty. *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

The fragments of a building blown down by a tempest are not thereby converted into personalty, but pass with the realty to a purchaser at a sheriff's sale. *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 696.

fective severance, the disannexation of the fixture must not only be done by or through the act of the owner of the freehold, but there must also exist a concurrent intention on the part of the owner to convert the chattel annexed into personality.⁶ Intention, in this connection, is so far effective that articles which are a part of the realty may become, in certain cases, personality, even though not severed; but it must be open and disclosed,—mere intention, in itself, not manifest and indicated by a positive act, is unavailable.⁷

A tortious or unauthorized severance does not change the character of the article, as between the original parties, so long as it retains its identity and can be traced;⁸ but the owner of the realty may elect to treat the article tortiously severed as personality, and, in fact, this is the usual procedure in cases of this character, where the remedy at law is better obtained by the personal action of trover or replevin.⁹

⁶ *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780. So, a mortgagee does not lose his lien upon a house situated on mortgaged premises by its removal, without his consent, to another lot, since it is a fixture, and part of the security of his mortgage. *Hamlin v. Parsons*, 12 Minn. 108 (Gil. 59), 90 Am. Dec. 284.

⁷ *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

⁸ An engine, boiler, and printing press, and all their attachments, wrongfully removed from a building, are not deprived of their character as fixtures by such severance, since it is not necessary that a chattel should always be attached to the realty, so as to make it a part thereof. *Otis v. May*, 30 Ill. App. 581.

Growing timber severed by a trespasser is still realty while it remains on the owner's land. *Altemose v. Hufsmith*, 45 Pa. 121.

⁹ Upon the tortious severance of articles that are a part of the realty, the owner thereof may, at his option, treat them as personality, and bring trover for their value. *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Moody v. Whitney*, 34 Me. 563; *Strickland v. Parker*, (118)

§ 23. Constructive severance.

Fixtures may be constructively severed; that is, there may exist a severance in law of articles annexed without a severance in fact; for parties may, by special agreement, determine the character of a fixture which would otherwise be a part of the realty, as personalty, even without an actual severance.¹⁰ In such cases, the question primarily is one of the intention of the parties.¹¹ A constructive severance of a

54 Me. 263; *Mooers v. Wait*, 3 Wend. (N. Y.) 104; *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *Burnside v. Twitchell*, 43 N. H. 390; *Greenebaum v. Taylor*, 102 Cal. 624; *Westgate v. Wixon*, 128 Mass. 304; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612. See post, c. 14, §§ 109, 110.

Likewise, replevin under the same circumstances will lie. *Christian v. Dripps*, 28 Pa. 278; *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa, 533; *Laflin v. Griffiths*, 35 Barb. (N. Y.) 58; *Ogden v. Stock*, 34 Ill. 522; *Sands v. Pfeiffer*, 10 Cal. 258; *Richardson v. York*, 14 Me. 216; *Matzon v. Griffin*, 78 Ill. 477; *Balliett v. Humphreys*, 78 Ind. 388; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Tudor Iron Works v. Hitt*, 49 Mo. App. 472; *Kirch v. Davies*, 55 Wis. 287; *Huebschmann v. McHenry*, 29 Wis. 655; *Jones' Appeal*, 102 Pa. 288.

But where articles tortiously severed have been again annexed by the tortfeasor, there is a conflict of authority as to the rights of the rightful owner, in regard to which see post, c. 14, §§ 109b, 110b, "Tortious Severance."

¹⁰ Where, by parol agreement, the severance of a house from the freehold at pleasure is contemplated by the parties, the house immediately becomes personal property. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749. See post, c. 5, "Agreements as to the Character of Fixtures"; § 25, and notes 1-3.

¹¹ In the case of *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 696, the court says: "What, then, is the criterion by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the

fixture may be indicated and become effective from an express agreement recognizing the article annexed as personalty.¹² Thus, machinery in a building, ordinarily a part of the realty, may be constructively severed by agreement of the parties.¹³ So, where the owner of the realty, by a valid agreement, sells the fixtures annexed to the freehold, they ordinarily become personal property.¹⁴ Likewise, a constructive severance of fixtures may be shown by a reservation in a deed.¹⁵ So, it seems, a parol agreement treating

tree prostrated by the tempest is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character."

¹² The principle is well settled that parties may treat as personal property machinery which would otherwise be part of the realty, and thus convert it into personal property as between themselves. *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Fitzgerald v. Anderson*, 81 Wis. 342, 51 N. W. 554.

¹³ In *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110, where a lease was given by one of the stockholders of a manufacturing corporation to the other stockholders, providing that all the machinery in a certain building should belong absolutely to the lessees, with power of removal, it was held that the parties, by such an agreement, might treat as personal property machinery which would otherwise be part of the realty; citing *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Fitzgerald v. Anderson*, 81 Wis. 342, 51 N. W. 554.

¹⁴ *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Davis v. Emery*, 61 Me. 140; *Hoit v. Stratton Mills*, 54 N. H. 110; *Sterling v. Baldwin*, 42 Vt. 306; *Shaw v. Carbrej*, 13 Allen (Mass.) 462.

¹⁵ Where a deed of a hotel, with the appurtenances and improvements thereunto belonging, reserved to the vendor the furniture, carpets, and pictures, but none of the permanent fixtures of the hotel, it was held that the gas fixtures, kitchen range, patent water filter, tanks, and mosquito screens passed with the deed as permanent fixtures. *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251.

a fixture annexed as personalty is sufficient to effect a constructive severance;¹⁶ and this effect, in some cases, is given to the execution of a chattel mortgage on a fixture.¹⁷

¹⁶ *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749 (house); *Bostwick v. Leach*, 3 Day (Conn.) 476; *Strong v. Doyle*, 110 Mass. 92; *Moody v. Aiken*, 50 Tex. 65; *Tyson v. Post*, 108 N. Y. 217 (plant and machinery of marine railroad). But see *Gibbs v. Estey*, 15 Gray (Mass.) 589; *Madigan v. McCarthy*, 108 Mass. 377; *Meagher v. Hayes*, 152 Mass. 228.

Thus, the sale by the owner of the realty of a barn located thereon, separate from the real estate, passes title to the barn as personal property. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637.

So, a sale by parol of a standing building upon the land of the owner, but to be severed and taken away, is valid. *Long v. White*, 42 Ohio St. 59.

So, in *Shaw v. Carbrey*, 13 Allen (Mass.) 463, where buildings were sold separately from the land, it was held that the purchaser had a right to sever them as personalty within a reasonable time. See, also, *Burk v. Hollis*, 98 Mass. 55; *Poor v. Oakman*, 104 Mass. 309; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105.

In *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489, it was held that hay scales which were placed upon land by the owner in the usual manner, and intended as a permanent annexation thereto, could not be conveyed or constructively severed and converted into personal property by a bill of sale not under seal.

Whether a simple bargain and sale and payment of purchase money, without other act, will amount to a severance of the house from the realty, so as to make it a chattel in the hands of the vendee, is questionable. *Goff v. O'Conner*, 16 Ill. 421.

¹⁷ As to this last proposition, there is a variance of opinion among the courts as to the exact effect to be given a chattel mortgage in connection with a severance. There seems to be at least two lines of decisions. Among some of the courts, particularly Massachusetts, Wisconsin, Michigan and Illinois, the trend of the decisions leans towards the consideration of the execution of a chattel mortgage on articles that are a part of the realty, not as giving to them the char-

Thus, a chattel mortgage on a growing nursery stock operates as a severance from the land, and, after default, the chattel

acter of personalty, but rather as being evidence of the intention of the parties, and, in connection with severance, simply granting a license to the chattel mortgagee to enter and make an actual severance. In the case of *Richardson v. Copeland*, 6 Gray (Mass.) 536, 66 Am. Dec. 424, where a steam engine and boiler were firmly fastened to the freehold, and a chattel mortgage had been subsequently given on the same, it was held that the making of the chattel mortgage did not give the character of personalty to the articles, as against a subsequent purchaser of the realty, even though he bought the realty with notice of the chattel mortgage.

So, in Idaho, in the case of *Beeler v. C. C. Mercantile Co.* (Idaho) 70 Pac. 943, 60 L. R. A. 283, it is held that a hotel building which is affixed to and conveyed with the land upon which it stands as real estate cannot thereafter, by mere agreement of the parties, become personal property, and be legally incumbered by a chattel mortgage, until after it has been severed from the freehold.

In *Cross v. Weare Commission Co.*, 153 Ill. 512, 46 Am. St. Rep. 902, Magruder, J., said: "Where a chattel mortgage is executed upon machinery or buildings or articles after they have been so affixed to the realty as to become a part of it, and where the lease or other instrument of title under which the mortgagor holds does not authorize a removal of the thing attached, and where such removal cannot be made without injury to the realty or to the fixture itself, the agreement of the parties will not have the effect of preserving the character of personalty in the things so affixed to the freehold. * * * Where such conditions exist, the case does not come within any exception to the rule that parties cannot, by their mere agreement, convert into personalty that which the law declares to be real estate."

In those cases where a chattel mortgage is executed upon machinery and other articles which are a part of the realty simultaneously with a real-estate mortgage upon the premises, it is held that the chattel mortgage is simply evidence of the intent of the parties, and not conclusive of the character of the articles as personalty. *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117; *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426.

Where a building has once been annexed to the realty, any sub-

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mortgagee may enter and remove his personal property.¹⁸ The term "constructive severance" is perhaps ambiguous,

sequent contract of the owner, or any acts of his, such as giving a chattel mortgage, without a severance, will not, as against a purchaser of the land, disconnect it from the realty and give it the character of personal property. *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Burk v. Hollis*, 98 Mass. 55; *Poor v. Oakman*, 104 Mass. 309; *Docking v. Frazell*, 34 Kan. 29; *Green v. Chicago, R. I. & P. R. Co.*, 8 Kan. App. 611, 56 Pac. 136.

On the other hand, other courts, among them Arkansas, and the earlier cases in Dakota, Wisconsin, Michigan, and Maine, proceed on the principle laid down by Judge Cooley in his work on Torts, 430, where it states that "the parties concerned may, by agreement between themselves in due form, give to fixtures the legal character of realty or personalty, at their option, and the law will respect and enforce their understandings whenever the rights of third persons will not be prejudiced. * * * Thus, a house, constituting a part of the realty, may be mortgaged separate from the land, or sold separate from it, and the mortgage or sale will be perfectly valid if made in such form as to be sufficient under the statute of frauds."

In *Hensley v. Brodie*, 16 Ark. 511, the sale of an engine and other apparatus in a mill building, accompanied by delivery of possession to the vendee, constituted a severance. In *Gooding v. Riley*, 50 N. H. 400, the execution of a chattel mortgage on articles that were a part of the realty made them personalty. See *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268; *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314; *Crippen v. Morrison*, 13 Mich. 24; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *Simons v. Pierce*, 16 Ohio St. 215; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541, 3 N. W. 547; *Carpenter v. Waiker*, 140 Mass. 416, 5 N. E. 160; *Foy v. Reddick*, 31 Ind. 414; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. 513; *Denham v. Sankey*, 38 Iowa, 269; *Folsom v. Moore*, 19 Me. 252; *Dudley v. Foote*, 63 N. H. 57. It may be noted that most of these cases bring to bear, in connection with the facts of the case, some of the other tests, and that the question of intention ascertainable from other sources than that of the execution of the chattel mortgage is an important consideration.

¹⁸ *Duffus v. Bangs*, 43 Hun (N. Y.) 52.

but it is here used with the premises in mind that a fixture which is a part of the realty becomes personal property only by a severance, actual or constructive.

§ 24. Temporary severance.

To give the character of personalty to chattels that have become a part of the realty, it is not only necessary that there be a severance, actual or constructive, but that there exist, contemporaneously, an intention on the part of the owner of the realty to permanently sever the chattels.¹⁹ A mere temporary severance for purposes of repair or for convenience does not change the character of the chattel.²⁰ Thus, articles that are severed from the realty in cases of necessity, such as fire, flood, etc., are still a part of the realty;²¹ so, hop poles severed from the freehold, and piled in a heap in a yard until the next hop season;²² likewise the parts of a barn that are temporarily disconnected from the realty merely for convenience in making repairs.²³ So, a fence that is

¹⁹ *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 696; *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311; *Heaton v. Findlay*, 12 Pa. 304; *Lewis v. Rosler*, 16 W. Va. 333. But see *Blethen v. Towle*, 40 Me. 310 (stoves ordinarily realty when attached, but stored for summer, held personalty).

²⁰ *Tolles v. Winton*, 63 Conn. 442; *Curry v. Schmidt*, 54 Mo. 515; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232, 37 Am. Dec. 203; *McLaughlin v. Johnson*, 46 Ill. 163; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

²¹ See ante, notes 4, 5.

²² *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68.

²³ "Both upon reason, because the severance of a fixture while in process of repair cannot vary its nature or deprive it of the character which annexation has conferred upon it, and upon authority, therefore, we think the testimony of the defendant as to his inchoate (124)

a part of the freehold by being accidentally or temporarily detached does not lose its character of realty.²⁴ So, where

intention, unaccompanying the act of severance, to substitute different fixtures to the barn in place of those removed by him for convenience in making repairs, was properly rejected, and that the tie-up planks, stanchion timbers, tie chains, and huge hooks were clearly and unequivocally, by destination, part and parcel of the realty, and, as such, passed by conveyance of the land to the plaintiff, although they were at the time, and under the circumstances found by the case, entirely dissevered therefrom." *Fowler, J., in Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 783.

Materials that are for the first time collected together for the purpose of erecting a building do not form a part of the realty, nor do materials that result from the demolition of a building retain their character of immovables, and form part of the realty, but where a building is torn down with the view and intention of remodeling and repairing by use of the same materials, the character of immovables, which the materials have acquired by being used in the construction of the first building, is not lost, but they continue immovable by destination, because they are intended to be used in repairing or reconstructing the old building. *Beard v. Duralde*, 23 La. Ann. 284.

²⁴ Where rails constituting a fence on a farm which has been conveyed by deed have been loaned to a neighbor, and are at the time of the conveyance upon the neighbor's property, they are, in contemplation of law, simply temporarily served, and pass by the deed. *McLaughlin v. Johnson*, 46 Ill. 163.

"Fences are a part of the freehold; and that the materials of which they were composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature." *Goodrich v. Jones*, 2 Hill (N. Y.) 142, 143. See, also, *Wilmarth v. Bancroft*, 10 Allen (Mass.) 348; *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80. But see *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173, where it is held that fence rails piled on the land at the time of its sale do not pass by the deed, though they had previously been in a fence on the land for nearly fifty years. See, also, *Robertson v. Phillips*, 3 G. Greene (Iowa) 220.

copper and brass were severed from the machinery, and put under lock and key for the purpose of preserving it, it was not a severance of so permanent a character as to convert it into a chattel.²⁵

§ 25. As to prior mortgagees of the land.

The application of the principles of severance varies according to the relation of the parties involved. As to prior mortgagees of the land in those states where a mortgage is considered, not as a conveyance, but rather as merely a lien on the land, the mortgagor has the right to make an actual severance of chattels that are a part of the realty, if he does not thereby impair the security of the mortgagee.²⁶ This principle is asserted under the old rule that a mortgagor, while in the possession of the realty, is not accountable for the rents and profits, and not liable, in an action at law, for waste committed while in possession; and if the security of the mortgagee of the realty was subject to impairment by the action of the mortgagor, his remedy was a suit in equity to enjoin.²⁷ Thus, in a Kentucky case the court said: "While

²⁵ *Lewis v. Rosler*, 16 W. Va. 333.

²⁶ *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Cooper v. Davis*, 15 Conn. 556; *Matzon v. Griffin*, 78 Ill. 477; *Clark v. Reyburn*, 1 Kan. 281; *Jackson v. Turrell*, 39 N. J. Law, 329; *Franks v. Cravens*, 6 W. Va. 185.

²⁷ *Cooper v. Davis*, 15 Conn. 556; *Matzon v. Griffin*, 78 Ill. 477.

The general rule in equity is that a mortgagor in possession has the right to cut timber on the lands mortgaged, and to do other parallel acts, and a court of equity will not interfere to restrain him or his assigns in the exercise of that right until it is made to appear that the cutting or other like act is being carried to an extent calculated to render the land an insufficient security for the amount due upon the mortgage. *Buckout v. Swift*, 27 Cal. 433, 87 Am. (126)

the alienation of the land itself by the mortgagor can only be made subject to the mortgage, his right to cut timber, tear down buildings, and to do all other acts in regard to his property that he may deem necessary for his interest is not affected by the mortgage. He may be restrained from committing waste, and can no doubt be held liable when he impairs the value of the estate mortgaged so as to endanger the rights of the lien creditor, or, in other words, he is liable for the debt, in any event, if the property, when subjected, fails to satisfy it."²⁸ But where a mortgage is considered as a conveyance, the legal title being vested in the mortgagee, and the equitable title in the mortgagor, the ruling is that a mortgagor has no more right to remove articles that are a part of the realty than a stranger to the title.²⁹ So, ordinarily, as

Dec. 90, citing *King v. Smith*, 2 Hare, 239; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 147; *Hampton v. Hodges*, 8 Ves. 105; *Wright v. Atkins*, 1 Ves. & B. 314; *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 511.

A mortgagee of the realty cannot maintain replevin, and thereby recover fixtures that have been fraudulently sold by the mortgagor. His remedy is a suit in equity. *Vanderslice v. Knapp*, 20 Kan. 647; *Alexander v. Shonyo*, 20 Kan. 705.

Machinery attached to a plantation and used for plantation purposes, though included in a mortgage, if purchased and removed, even during the pendency of a suit to enforce the mortgage, is withdrawn from the operation of the mortgage. When removed, it again becomes a movable, and, as such, could not be susceptible of mortgage, even if the purchaser took with knowledge of the mortgage. *Weill v. Thompson*, 24 Fed. 14.

²⁸ *Harris v. Bannon*, 78 Ky. 568.

²⁹ *Cole v. Stewart*, 11 Cush. (Mass.) 181; *Gooding v. Shea*, 103 Mass. 360; *Byrom v. Chapin*, 113 Mass. 308.

The right of action depends upon the mortgagor's interest in the property, and the damages are measured by the extent of injury to that property. *Woodruff v. Halsey*, 8 Pick. (Mass.) 333. It does not depend upon, and the damages are not to be measured by, proof of

against a *bona fide* prior mortgagee of the realty to which the fixture is attached, any agreement treating the same as personalty is ineffective, in the absence of an actual severance of the annexed chattel.^{29a} Thus, the giving of a chattel mortgage on articles that are a part of the realty does not serve to render those articles constructively severed, as against a prior mortgagee of the realty.³⁰

§ 26. As to prior lienors of the land.

The effect of a severance of articles from the realty as against a judgment creditor of the owner of the realty, or as against others holding prior liens on the land, is much the same as against prior mortgagees of the realty. In fact, as is asserted in a Pennsylvania case,³¹ where a mortgage is treated, not as a conveyance, there is no substantial difference between these two classes of creditors. The mortgagee has no estate in the land, any more than the judgment creditor,—both have liens upon it, and no more than that. Diversi-

insufficiency of the remaining security. The mortgagee is not obliged to accept what remains in satisfaction pro tanto of his debt at any valuation whatsoever. He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt. *Byrom v. Chapin*, 113 Mass. 311; *Page v. Robinson*, 10 Cush. (Mass.) 99.

^{29a} *Hart v. Sheldon*, 34 Hun (N.Y.) 38; *Smith v. Waggoner*, 50 Wis. 155; *Adams v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487. But see ante, c. 3, notes 95-97.

³⁰ As between a mortgagee of machinery annexed to a building and a mortgagee of the realty upon which the building stands, without notice of the former's claims, actual severance before the making of the real-estate mortgage is necessary to deprive the articles of their character as realty. *Brennan v. Whitaker*, 15 Ohio St. 446.

³¹ *Witmer's Appeal*, 45 Pa. 455, 84 Am. Dec. 505, citing *Asay v. Hoover*, 5 Pa. 35; *Edmonson v. Nichols*, 22 Pa. 79; *Rickert v. Madeira*, 1 Rawle (Pa.) 328; *Wilson v. Shoenberger's Ex'rs*, 31 Pa. 299.

ties that do exist have reference to the extent and duration of the liens, and the remedies for enforcing them. Thus, in *Gray v. Holdship*³² it was held that a mechanic's lien against a brewery, in which a boiler had been distrained for rent, and severed, would hold the boiler, as against a purchaser of it, as a chattel. So, in *Witmer's Appeal*,³³ the sale of a steam engine and connecting machinery, after their severance from the realty, with the fraudulent purpose on the part of the owner to prefer certain creditors, was restrained by injunction at the suit of a judgment creditor upon the ground that, after the liens had attached, the owner of the realty could not commit waste for the purpose of preferring a creditor. But in *State v. Goodnow*³⁴ it was held that the state lost its lien for taxes on a boiler and other machinery, which were a part of the realty, upon their severance, inasmuch as they became personalty. So, in *Stowell v. Waddingham*,³⁵ a vendor's lien was ineffective against articles that had been severed from the realty. These last two cases proceeded upon the theory that a severance of articles renders them, in any event, personalty.³⁶

³² *Gray v. Holdship*, 17 Serg. & R. (Pa.) 415, 17 Am. Dec. 680.

³³ *Witmer's Appeal*, 45 Pa. 455, 84 Am. Dec. 505. See, also, *Latham v. Blakely*, 70 N. C. 368, where it was held that the owner of the realty cannot sever articles and convert them into personalty after an execution has been levied on the land to which they are attached. Also, *Yates v. Joyce*, 11 Johns. (N. Y.) 136, where a severance was not permitted as against a judgment creditor. See *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 323; *Maxson's Appeal*, 75 Pa. 187.

³⁴ *State v. Goodnow*, 80 Mo. 271.

³⁵ *Stowell v. Waddingham*, 100 Cal. 7.

³⁶ Following *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 901.

§ 27. As to subsequent vendees or mortgagees of the realty.

An actual severance of articles by their owner before the sale or mortgaging of the realty is, of course, effective as against a subsequent vendee or mortgagee of the same;³⁷ but the severance must be actual,—a mere constructive severance is ineffectual. “The owner of land cannot, by agreement between himself and another, make that which in its nature is land personal property, as against a subsequent purchaser for value without notice, there having been no actual severance of the subject of the agreement.”³⁸ This question arises most frequently in cases where chattel mortgages have been given upon articles that are a part of the realty, the general rule being that, as to subsequent *bona fide* vendees and mortgagees of the realty, the articles remain realty.³⁹ In

³⁷ *Fulton v. Norton*, 64 Me. 410.

³⁸ *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476: “The rule that things of a personal nature, annexed to the freehold by a person other than the owner, may, by agreement between him and the owner, retain their character as chattels, and will not pass on a conveyance of the fee, is not applicable.” So, in *Trull v. Fuller*, 28 Me. 545, Tenney, J., said: “It is competent for the owner of real estate to sell, upon good and sufficient consideration, fixtures thereon which would pass under a conveyance of the realty if they were not excepted. The purchaser would be entitled to sever the same within the time stipulated, or, if no time was agreed upon, within a period which, under all the circumstances, and according to the character of the subject of the purchase, would be deemed reasonable. But without a severance, or some indication, actual or constructive, that they had been sold, they would, as between the purchaser and attaching creditors, or subsequent purchasers of the real estate to which they attached, be considered as still a part of the freehold.”

³⁹ See ante, c. 3, notes 89, 90 and 91. Also, *Tift v. Horton*, 53 N. Y. 377; *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 N. Y. 344. See

this connection, the *bona fide* character of the vendee or the mortgagee is the important thing to determine. Actual notice of a prior chattel mortgage, or other agreement showing the character of a chattel, is, in general, effective in destroying this *bona fide* relation.⁴⁰ As to constructive notice, the cases are not in entire accord, especially where statutes are in existence requiring the filing of chattel mortgages and other agreements, and giving, by that filing, constructive notice to all parties, although the general weight of opinion seems to consider such notice ineffective as against subsequent vendees and mortgagees of the realty.⁴¹ But execu-

chapter 5, "Agreements as to the Character of Fixtures"; post, § 29b, "Subsequent Vendees and Mortgagees of the Realty."

⁴⁰ Trull v. Fuller, 28 Me. 545; Smith v. Waggoner, 50 Wis. 155; Jones v. Cooley, 106 Iowa, 165, 76 N. W. 652. See, contra, Madigan v. McCarthy, 108 Mass. 376, 11 Am. Rep. 371; Richardson v. Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424; Gibbs v. Estey, 15 Gray (Mass.) 587; Burk v. Hollis, 98 Mass. 55; Poor v. Oakman, 104 Mass. 309; Goff v. O'Conner, 16 Ill. 421.

⁴¹ Tibbetts v. Horne, 65 N. H. 242; Keeler v. Keeler, 31 N. J. Eq. 181.

"To convey that which constitutes a part of the real estate, but which, by a severance, may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required, unless a severance takes place. Against those who can legally insist upon these formalities, the interest attempted to be sold does not become personal property till there is a severance in fact, or 'until all that is required to convey real estate is perfected. Before its former character can be changed by a sale, the sale must be such as is necessary to convey property of that character. By a performance of a part only of what is required to pass a title to real estate, it does not cease to be what it was prior to the first steps taken towards a conveyance." Trull v. Fuller, 28 Me. 545; Bringholff v. Munzenmaier, 20 Iowa, 513; Keeler v. Keeler, 31 N. J. Eq.

tion purchasers and assignees in bankruptcy do not hold the position of *bona fide* purchasers for value, so as to be able to claim as against a prior chattel mortgage.⁴²

181. But see *Mitchell v. Freedley*, 10 Pa. 198; *Keeney v. Whitlock*, 7 Ind. App. 162; *Hensley v. Brodie*, 16 Ark. 511.

The uncertainty of the law upon this subject is evidenced by the cases where the parties have executed both a chattel and a real-estate mortgage upon articles that are a part of the freehold, to insure the security of the mortgagee. See *Miles v. McNaughton*, 111 Mich. 350, 69 N. W. 481; *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426; *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117.

⁴² *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Ex parte Ames*, 1 Lowell, 561, Fed. Cas. No. 323; *Sowden v. Craig*, 26 Iowa, 163.

CHAPTER V.

AGREEMENTS AS TO THE CHARACTER OF FIXTURES.

- § 28. As between the parties thereto—Effect generally.
- (a) The time of the agreement.
 - (b) What constitutes an agreement.
 - (1) By a deed or lease.
 - (2) By conditional contract of sale.
 - (3) By parol.
 - (4) By execution of a chattel mortgage.
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29. As to third parties—Effect generally.
- (a) Prior mortgagees of the realty.
 - (b) Subsequent vendees and mortgagees of the realty.
 - (c) Purchasers at an execution sale.
 - (d) Judgment lienors.
 - (e) Liens of vendors.
 - (f) Vendors giving contract to convey.
 - (g) Purchaser at foreclosure of trust deed.
 - (h) Liens of mechanics.
 - (i) Lessors of land.

§ 28. As between the parties thereto—Effect generally.

In accordance with the general principle of law that parties may determine, between themselves, the legal effect of any transaction by an express agreement, it is well settled in the law of fixtures that parties may fix by agreement, duly expressed, the character of a chattel in accordance with their desires, so that that which the law might ordinarily regard as realty may be treated, as between themselves, as personalty, and *vice versa*, and the courts will execute these

agreements if duly made.¹ Thus, the general rules applicable to fixtures may be completely set aside and superseded by the agreement of the parties in determining the character

¹ An express agreement as to the character of an article is conclusive. *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1; *Deering v. Ladd*, 22 Fed. 575; *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. 879; *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. 19.

English: *Mansfield v. Blackburne*, 6 Bing. N. C. 426.

Alabama: *Powers v. Harris*, 68 Ala. 409; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749.

Arkansas: *Witherspoon v. Nickels*, 27 Ark. 332; *Harmon v. Kline*, 52 Ark. 251; *Demby v. Parse*, 53 Ark. 526, 12 L. R. A. 87.

California: *Fratt v. Whittier*, 58 Cal. 126; *Merritt v. Judd*, 14 Cal. 60.

Connecticut: *Parker v. Redfield*, 10 Conn. 490; *Baldwin v. Breed*, 16 Conn. 60; *Curtiss v. Hoyt*, 19 Conn. 154.

Dakota: *Myrick v. Bill*, 3 Dak. 284, 17 N. W. 268.

Delaware: *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192.

Georgia: *Smith v. Odom*, 63 Ga. 499.

Illinois: *Meyers v. Schemp*, 67 Ill. 469; *Sword v. Low*, 122 Ill. 502; *Hewitt v. General Electric Co.*, 164 Ill. 420; *Ellison v. Salem Coal & Min. Co.*, 43 Ill. App. 120; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302.

Indiana: *Frederick v. Devol*, 15 Ind. 357; *Yater v. Mullen*, 24 Ind. 277; *Young v. Baxter*, 55 Ind. 188; *Pea v. Pea*, 35 Ind. 387; *Gritfin v. Ransdell*, 71 Ind. 440; *Price v. Malott*, 85 Ind. 266; *Malott v. Price*, 109 Ind. 22; *Brown v. Corbin*, 121 Ind. 455.

Iowa: *Wilgus v. Gettings*, 21 Iowa, 177; *District Township of Corwin v. Moorehead*, 43 Iowa, 466; *Walton v. Wray*, 54 Iowa, 531; *Melhop v. Meinhardt*, 70 Iowa, 685; *Fischer v. Johnson*, 106 Iowa, 181.

Kansas: *Board Com'rs of Rush County v. Stubbs*, 25 Kan. 322; *Docking v. Frazell*, 34 Kan. 29.

Maine: *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Fuller v. Tabor*, 39 Me. 519; *Fifield v. Maine Central R. Co.*, 62 Me. 80; *Tapley v. Smith*, 18 Me. 12.

Massachusetts: *Howard v. Fessenden*, 14 Allen, 124; *Wells v. Banister*, 4 Mass. 514; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Bartholomew v. Hamilton*, 105 Mass. 239; *Hartwell v. Kelly*, 117 (134)

of articles annexed. This general proposition, however, is subject to certain restrictions and modifications, for, as

Mass. 235; Taft v. Stetson, 117 Mass. 471; Curtis v. Riddle, 7 Allen, 185; Doty v. Gorham, 5 Pick. 487, 16 Am. Dec. 417; Marcy v. Darling, 8 Pick. 283; Ashmun v. Williams, 8 Pick. 402; Curry v. Commonwealth Ins. Co., 10 Pick. 540, 20 Am. Dec. 547; Rogers v. Woodbury, 15 Pick. 156; Inhabitants of First Parish in Sudbury v. Jones, 8 Cush. 190; Belding v. Cushing, 1 Gray, 578; Richardson v. Copeland, 6 Gray, 536, 66 Am. Dec. 424; Handforth v. Jackson, 150 Mass. 149.

Michigan: Crippen v. Morrison, 13 Mich. 23; Harris v. Scovel, 85 Mich. 32, 48 N. W. 173; Lake Superior Ship Canal, Railway & Iron Co. v. McCann, 86 Mich. 106, 48 N. W. 692; Robertson v. Corsett, 39 Mich. 777.

Minnesota: Warner v. Kenning, 25 Minn. 173; Stout v. Stoppel, 30 Minn. 56; Little v. Willford, 31 Minn. 173; Merchants' Nat. Bank of Crookston v. Stanton, 55 Minn. 211, 56 N. W. 821; Northwestern Mut. Life Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028.

Missouri: Dietrich v. Murdock, 42 Mo. 279; Goodman v. Hannibal & St. J. R. Co., 45 Mo. 33, 100 Am. Dec. 336; Priestley v. Johnson, 67 Mo. 632; Lowenberg v. Bernd, 47 Mo. 297.

New Hampshire: Haven v. Emery, 33 N. H. 66; Bean v. Brackett, 34 N. H. 118; Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195; Ford v. Burleigh, 62 N. H. 388; Laird v. Railroad, 62 N. H. 254.

New Jersey: Pope v. Skinkle, 45 N. J. Law, 39; Mayo v. Newhoff, 47 N. J. Eq. 31; Brearley v. Cox, 24 N. J. Law, 287.

New York: Ford v. Cobb, 20 N. Y. 349; Sheldon v. Edwards, 35 N. Y. 279; Voorhees v. McGinnis, 48 N. Y. 278; Tiff v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Smith v. Benson, 1 Hill, 176; Godard v. Gould, 14 Barb. 662; Rowland v. Sworts, 63 Hun, 625, 17 N. Y. Supp. 399; Tyson v. Post, 108 N. Y. 217, 15 N. E. 316.

North Carolina: Freeman v. Leonard, 99 N. C. 274; Causey v. Empire Plaid Mills, 119 N. C. 180.

Ohio: Teaff v. Hewitt, 1 Ohio St. 534, 59 Am. Dec. 634; Case Mfg. Co. v. Garven, 45 Ohio St. 289.

Oregon: Henkle v. Dillon, 15 Or. 610.

Pennsylvania: Piper v. Martin, 8 Pa. 206; Shell v. Haywood, 16 Pa. 523; Coleman v. Lewis, 27 Pa. 291; Harlan v. Harlan, 20 Pa. 303; Mitchell v. Freedley, 10 Pa. 198; Sampson v. Graham, 96 Pa. 405; Charlotte Furnace Co. v. Stouffer, 127 Pa. 336; Advance Coal Co. v. Miller, 7 Kulp, 541.

Denio, J., says:² "It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is

South Carolina: *Sullivan v. Jones*, 14 S. C. 362; *Evans v. McLucas*, 15 S. C. 67; *Dominick v. Farr*, 22 S. C. 585; *Reid v. Kirk*, 12 Rich. Law, 54.

Texas: *Harkey v. Cain*, 69 Tex. 150; *San Antonio Brew. Ass'n v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99; *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 694.

Vermont: *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213.

Wisconsin: *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110.

An agreement is effective, as between the parties, to prevent a building from becoming real property when built by one upon the land of another. *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33; *Harmon v. Kline*, 52 Ark. 251; *Myrick v. Bill*, 3 Dak. 284; *Curtiss v. Hoyt*, 19 Conn. 154; *Tapley v. Smith*, 18 Me. 12; *Doty v. Gorham*, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; *Handforth v. Jackson*, 150 Mass. 149; *Priestley v. Johnson*, 67 Mo. 632; *Lowenberg v. Bernd*, 47 Mo. 297; *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33, 100 Am. Dec. 336; *Ford v. Burleigh*, 62 N. H. 388; *Laird v. Railroad*, 62 N. H. 254; *Dame v. Dame*, 38 N. H. 429; *Mayo v. Newhoff*, 47 N. J. Eq. 31; *Pope v. Skinkle*, 45 N. J. Law, 39; *Smith v. Benson*, 1 Hill (N. Y.) 176; *Freeman v. Leonard*, 99 N. C. 274; *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110.

Machinery affixed to a building may retain, by agreement between the parties, its character of personalty. *Ott v. Specht*, 8 Houst. (Del.) 61; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Marshall v. Bachelidor*, 47 Kan. 442; *Bartholomew v. Hamilton*, 105 Mass. 239; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259; *Harlan v. Harlan*, 20 Pa. 303; *Mitchell v. Freedley*, 10 Pa. 198; *Piper v. Martin*, 8 Pa. 211; *San Antonio Brew. Ass'n v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99; *Harkey v. Cain*, 69 Tex. 150.

² *Ford v. Cobb*, 20 N. Y. 344. See, also, *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125.

such that the attributes of personal property cannot be predicated of the thing in controversy. Thus, a house or other building, which, from its size, or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So, of the separate materials of a building, and things fixed into the wall, so as to be essential to its support, it is impossible that they should by any arrangement between the owners become chattels. * * * It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot, in general, be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed." And so, apparently, parties cannot fix the character of an article which is so annexed to the freehold as to be not removable without causing serious injury to the freehold, or without the destruction of the article itself.³ Likewise, the agreement must bear the ordi-

³ *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 3 McCrary, 130, 11 Fed. 1; *Sword v. Low*, 122 Ill. 487; *Gorham v. Dodge*, 122 Ill. 528; *Binkley v. Forkner*, 117 Ind. 186; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889; *Tift v. Horton*, 53 N. Y. 380, 13 Am. Rep. 537; *Fryatt v. Sullivan Co.*, 5 Hill (N. Y.) 116; *Fortman v. Goepper*, 14 Ohio St. 564; *Henkle v. Dillon*, 15 Or. 610; *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95.

But many cases assert that the manner and degree of attachment of articles is immaterial when the parties agree to consider them personal property. *White's Appeal*, 10 Pa. 252; *Hill v. Sewald*, 53

nary tests of a legal contract, and hence must not be contrary to public policy.⁴ In making an agreement, the parties thereto must be capable of contracting with each other. Thus, it has been held that a husband and wife cannot contract with each other as to the fixtures upon the wife's land.⁵ Likewise, a guardian cannot contract with himself as to the fixtures erected by him upon his ward's estate.⁶

— (a) The time of agreement.

As to the time of agreement, the parties may at any time, either before or after annexation, agree as to the character of a chattel annexed, provided the agreement is duly made, and the rights of third parties are not prejudiced.⁷ The

Pa. 271; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Lake Superior Ship Canal, Ry. & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692.

⁴ In the case of *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, it was held that property that was real, within the valued policy law of Missouri, could not be changed into personal property by the agreement of the parties, so as take it without the operation of the statute.

⁵ *Marable v. Jordan*, 5 Humph. (Tenn.) 417, 42 Am. Dec. 441; *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 310; *Hughes v. Peters*, 1 Cold. (Tenn.) 70; *Doak v. Wiswell*, 38 Me. 569.

⁶ *Copley v. O'Neil*, 1 Lans. (N. Y.) 214.

⁷ *Ex parte Ames*, 1 Lowell, 561, Fed. Cas. No. 323; *Howard v. Fessenden*, 14 Allen (Mass.) 124 (building); *Aldrich v. Husband*, 131 Mass. 480; *Hines v. Ament*, 43 Mo. 298 (line fence).

Where the owner of the realty executed a chattel mortgage on certain machinery, and subsequently affixed the same to the realty, so as to ordinarily become a part thereof, it was held the chattel mortgagee could claim the same against any subsequent purchaser of the realty having knowledge of the facts. *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125.

A dwelling house erected on the land of another, with the previous

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rule formerly asserted was that the agreement must have been made before the article became realty.⁸ This rule, however, as the cases show, evidently applied only to cases of parol agreements, and does not affect those cases that properly come under the head of constructive severance.⁹ Even

knowledge and consent of the owner of the land, remains the personal property of the builder. *Fuller v. Tabor*, 39 Me. 519.

An agreement giving a right to remove a building which is put upon the land of another may be shown from the subsequent dealings of the parties. *Morris v. French*, 106 Mass. 326.

⁸ A house built upon and annexed to land cannot be shown to be personal property, as against a subsequent grantee of the land, by evidence of an oral agreement of the owner of the land after the building had been begun. In any case, such separation of the personal from the real estate to which it is attached must be established by evidence of assent to the erection of the same before the structure is erected, and has become attached to the realty. *Gibbs v. Estey*, 15 Gray (Mass.) 587. See, also, *Richardson v. Copeland*, 6 Gray (Mass.) 536; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Morris v. French*, 106 Mass. 326.

A house having once been affixed to the freehold, and there being no evidence whatever of any previous or contemporaneous agreement that it should remain personal property, becomes part of the realty, and cannot afterwards be made a chattel by a mere express parol agreement. *Aldrich v. Husband*, 131 Mass. 480; *Madigan v. McCarthy*, 108 Mass. 376; *Westgate v. Wixon*, 128 Mass. 304.

⁹ In *Ex parte Ames*, 1 Lowell, 567, Fed. Cas. No. 323, Lowell, J., said: "It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this, some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established."

And so in *Fuller v. Tabor*, 39 Me. 519, a subsequent parol agree-

a parol agreement as to the character of a fixture, made subsequent to the annexation, is recognized by some cases as valid as between the parties.¹⁰

— (b) **What constitutes an agreement.**

The parties interested may treat fixtures, which are ordinarily a part of the realty, as personal property by an agreement, express or implied.

— (1) **By a deed or lease.**

An express agreement may be made by a deed in writing, conveying the freehold, and expressly reserving certain fixtures as personalty,¹¹ or by a lease with an express reservation of certain annexed chattels.¹²

— (2) **By conditional contract of sale.**

Chattels annexed to the realty are frequently made to retain their character of personalty by an express contract of sale, wherein the vendor retains the title to the chattels until

ment was held, under the circumstances of the case, equivalent to an agreement prior to the annexation of the chattel. See, also, *Hines v. Ament*, 43 Mo. 298.

¹⁰ Where a matter connected with the freehold is a personal chattel when severed, it may be treated as such whenever either the law or the agreement of the parties contemplate an actual severance. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749 (house); *Bostwick v. Leach*, 3 Day (Conn.) 476 (machinery); *Strong v. Doyle*, 110 Mass. 92; *Moody v. Aiken*, 50 Tex. 65; *Tyson v. Post*, 108 N. Y. 217; *Fuller v. Tabor*, 39 Me. 519 (dwelling house); *Hines v. Ament*, 43 Mo. 298 (line fence).

¹¹ *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251; *Leonard v. Stickney*, 131 Mass. 541; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302.

¹² *Lake Superior Ship Canal, Railway & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110.

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they are fully paid for by the vendee.¹³ These agreements form a numerous class of cases, and the conditional vendor is generally protected except where the rights and interests of third parties may be prejudiced thereby.¹⁴

— (3) By parol.

A parol agreement as to the character of fixtures in many

¹³ Alabama: *Warren v. Liddell*, 110 Ala. 232.

Delaware: *Ott v. Specht*, 8 Houst. 61.

Iowa: *Frey-Sheckler Co. v. Iowa Brick Co.*, 104 Iowa, 494, 73 N. W. 1051.

Kansas: *Marshall v. Bachelder*, 47 Kan. 442.

Massachusetts: *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542.

Michigan: *Ingersoll v. Barnes*, 47 Mich. 104; *Gill v. De Armant*, 90 Mich. 425, 51 N. W. 527; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061; *Jenks v. Colwell*, 66 Mich. 420, 11 Am. St. Rep. 502; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

Minnesota: *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028.

Mississippi: *Duke v. Shackelford*, 56 Miss. 552; *John Van Range Co. v. Allen* (Miss.; 1890) 7 So. 499.

New Jersey: *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101.

New York: *Sayles v. National Water Purifying Co.*, 62 Hun, 618, 16 N. Y. Supp. 555; *Hirsch v. Graves Elevator Co.*, 24 Misc. Rep. (N. Y.) 472; *Duffus v. Howard Furnace Co.*, 8 App. Div. (N. Y.) 567.

Ohio: *Case Mfg. Co. v. Garven*, 45 Ohio St. 289.

South Carolina: *Padgett v. Cleveland*, 33 S. C. 339.

Texas: *Harkey v. Cain*, 69 Tex. 146; *San Antonio Brew. Ass'n v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99.

Vermont: *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213.

Washington: *Wade v. Donau Brew. Co.*, 10 Wash. 284.

¹⁴ See post, this chapter, "Agreements as to the Character of Fixtures," § 29, "As to Third Parties."

cases binds the parties; for a parol agreement as to fixtures ordinarily is without the statute of frauds, and does not violate the fourth section thereof, as to conveyances of land and interests therein, inasmuch as, before annexation, a chattel is personalty.¹⁵ And as to certain parol agreements made subsequent to annexation, such as those between landlord and tenant, as to the character of fixtures erected by the tenant, the statute is not violated, for the articles, in accordance with many cases, do not become a part of the realty until the tenant's right of removal expires.¹⁶ Then, again, other parol agreements, made subsequent to annexation, have been held effective upon the ground that the agreements were equivalent, under the circumstances, to agreements made prior to annexation, and hence the articles never became realty.¹⁷ But generally, in regard to fixtures that become a part of the realty, the holding is, according to the weight of authority, that a parol agreement between the parties for the purpose of making certain articles personalty, after the articles have been annexed to the freehold, is within the statute of frauds.¹⁸ Yet other cases take such agreements without the

¹⁵ *Curtis v. Riddle*, 7 Allen (Mass.) 185; *Gibbs v. Estey*, 15 Gray (Mass.) 587; *Ex parte Ames*, 1 Lowell, 567, Fed. Cas. No. 323; *Tyler, Fixtures*, p. 729.

¹⁶ *Dubois v. Kelly*, 10 Barb. (N. Y.) 507; *Powell v. McAshan*, 28 Mo. 70; *South Baltimore Co. v. Muhlbaeh*, 69 Md. 395; *Hallen v. Runder*, 1 Crompt. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. Div. 700; *Roffey v. Henderson*, 17 Q. B. 574. But see post, c. 6, "Fixtures as between Landlord and Tenant," notes 4-6, and also § 32, "Nature of the Tenant's Interest."

¹⁷ *Fuller v. Tabor*, 39 Me. 519; *Hines v. Ament*, 43 Mo. 298.

¹⁸ *Bond v. Coke*, 71 N. C. 97; *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903. It may be noted in this connection that the term "fixtures" must be strictly treated as those chattels that have

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statute, upon the theory that the parties to the agreement are contemplating a severance, the articles are severable, and hence they are as much chattels as if actually severed.¹⁹

become a part of the realty. Tyler, in his work on Fixtures, asserts the rule that fixtures sold without the realty will pass by the same instrumentalities and forms as ordinary goods and chattels, and he quotes many English and American cases to support the principle; but many of the cases treat of removable fixtures, and in others the chattels never became realty as between the parties. See page 729 et seq.

The statute of frauds applies to fixtures that are irremovable, much the same as to growing trees, fruit, and grass, being *fructus industriales*, and not transferable by parol while attached. *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Warren v. Leland*, 2 Barb. (N. Y.) 613.

So, chattels that are a part of the realty cannot be excepted from the operation of a deed conveying the land by a parol agreement, for the reason that the parol exception is not only within the statute of frauds, but that it would contravene that well-known rule of evidence that parol contemporaneous proof is inadmissible to vary the terms of a valid written instrument. *Bond v. Coke*, 71 N. C. 97; *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Detroit, H. & I. R. Co. v. Forbes*, 30 Mich. 166; *Conner v. Coffin*, 22 N. H. 538.

¹⁹ In *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749, where the owner of the land agreed by parol to consider a house erected by a conditional purchaser of the land as personalty, it was held that his agreement was effective, and not within the statute of frauds, and this, upon the principle that, as crops can be so sold as chattels, and landlords can sell their fixtures without a conveyance, where a matter connected with the freehold is a personal chattel when severed, it may be treated as such wherever either the law or the agreement of the parties contemplate an actual severance. And so in *Bostwick v. Leach*, 3 Day (Conn.) 476, where an agreement to purchase the mill stones, running gear, and other fixtures, attached to a mill was considered as an agreement for the sale of chattels, and therefore not within the statute; for, "when there is a sale of property which would pass by a deed of land as such, without any other description,

— (4) By execution of a chattel mortgage.

Ordinarily, the execution of a chattel mortgage on chattels before they are annexed to the freehold has the effect of an implied agreement that they shall remain personalty,²⁰ and

if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute."

²⁰ See ante, c. 3, note 178.

Alabama: *Miller v. Griffin*, 102 Ala. 610, 15 So. 238; *Thomason v. Lewis*, 103 Ala. 427.

California: *Tibbetts v. Moore*, 23 Cal. 208.

Illinois: *Andrews v. Chandler*, 27 Ill. App. 103; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826.

Indiana: *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Iowa: *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541, 3 N. W. 547.

Kansas: *Eaves v. Estes*, 10 Kan. 314.

Massachusetts: *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. 160.

Michigan: *Burrill v. S. N. Wilcox Lumber Co.*, 65 Mich. 571.

Minnesota: *Warner v. Kenning*, 25 Minn. 173; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821.

Nebraska: *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765.

New Hampshire: *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56.

New Jersey: *Blancke v. Rogers*, 26 N. J. Eq. 563; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889.

New York: *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Sisson v. Hibbard*, 75 N. Y. 542; *Brand v. McMahon*, 60 Hun, 582, 15 N. Y. Supp. 39; *Rowland v. West*, 62 Hun, 583; *Manning v. Ogden*, 70 Hun, 399, 24 N. Y. Supp. 70.

Oregon: *Henkle v. Dillon*, 15 Or. 610.

Texas: *Cullers v. James*, 66 Tex. 494, 1 S. W. 314; *Harkey v. Cain*, 69 Tex. 146; *Willis v. Munger Improved Cotton Mach. Mfg. Co.*, 13 Tex. Civ. App. 677, 36 S. W. 1010.

See post, c. 6, "Fixtures as between Landlord and Tenant," § 29b, "Parol Agreement"; also chapter 7, "Fixtures between Grantor and Grantee," § 55c, "Parol Reservation."

in some cases the execution of a chattel mortgage upon articles that are already a part of the realty has the effect of converting them into personalty;²¹ but the mere fact that a chattel mortgage is executed simultaneously with a real-estate mortgage upon the chattels annexed does not divest them of their character as realty.²²

— (5) By license.

Where erections are made on the land of another with the consent or license of the landowner, an agreement is implied to consider the articles personalty.²³ In such cases,

²¹ *Gooding v. Riley*, 50 N. H. 400; *Dudley v. Foote*, 63 N. H. 57; *Sheldon v. Edwards*, 35 N. Y. 279; *Fortman v. Goepper*, 14 Ohio St. 558.

²² *Miles v. McNaughton*, 111 Mich. 350, 69 N. W. 481; *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426.

²³ *Deering v. Ladd*, 22 Fed. 575; *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396.

Arkansas: *Witherspoon v. Nickels*, 27 Ark. 332.

Indiana: *Frederick v. Devol*, 15 Ind. 357; *State v. Bonham*, 18 Ind. 231; *Yater v. Mullen*, 24 Ind. 277; *Pea v. Pea*, 35 Ind. 387; *Taylor v. Watkins*, 62 Ind. 511; *Griffin v. Ransdell*, 71 Ind. 440.

Iowa: *Fischer v. Johnson*, 106 Iowa, 181.

Maine: *Pullen v. Bell*, 40 Me. 314; *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Jewett v. Partridge*, 12 Me. 243, 28 Am. Dec. 173.

Massachusetts: *Washburn v. Sproat*, 16 Mass. 449; *Doty v. Gorham*, 5 Pick. 487, 16 Am. Dec. 417; *Curtis v. Riddle*, 7 Allen, 185; *Hinckley v. Baxter*, 13 Allen, 139; *Ham v. Kendall*, 111 Mass. 297; *Dolliver v. Ela*, 128 Mass. 557.

Minnesota: *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479, 12 Am. St. Rep. 676; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491, 59 Minn. 532, 61 N. W. 680, 62 Minn. 204, 64 N. W. 390; *Turner v. Kennedy*, 57 Minn. 104, 58 N. W. 823.

Mississippi: *Weathersby v. Sleeper*, 42 Miss. 733; *Stillman v. Hamer*, 7 How. 421.

Missouri: *Hines v. Ament*, 43 Mo. 298; *Matson v. Calhoun*, 44 Mo.

the license may be by parol,²⁴ or may be inferred from circumstances;²⁵ but the mere fact of a license existing does not necessarily imply that the articles annexed are personalty, where a different intention of the parties is shown by an express agreement, or by the relationship which they sustain towards each other.²⁶

§ 29. As to third parties—Effect generally.

In general, the effect of an agreement as to fixtures is pre-

368; *Lowenberg v. Bernd*, 47 Mo. 297; *Brown v. Baldwin*, 121 Mo. 126; *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1.

New Hampshire: *Harris v. Gillingham*, 6 N. H. 11, 23 Am. Dec. 701; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195.

New York: *Cayuga Ry. Co. v. Niles*, 13 Hun, 170; *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 20 Hun, 214.

North Carolina: *Feimster v. Johnson*, 64 N. C. 260; *Western North Carolina R. Co. v. Deal*, 90 N. C. 110.

Rhode Island: *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621.

Vermont: *Barnes v. Barnes*, 6 Vt. 388.

²⁴ *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Cayuga Ry. Co. v. Niles*, 13 Hun (N. Y.) 170.

"A license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the statute of frauds." 3 Kent, Comm. 452.

²⁵ *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396; *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770; *Northern Cent. Ry. Co. v. Canton County of Baltimore*, 30 Md. 347. But see *Hunt v. Missouri Pac. Ry. Co.*, 76 Mo. 115.

²⁶ Where a husband erects buildings on his wife's land, no agreement granting the right of removal will be implied. *Washburn v. Sproat*, 16 Mass. 449; *Doak v. Wiswell*, 38 Me. 569. Likewise, where a son makes improvements on the estate of his father, under the expectation of receiving the property from his father at a future date, the improvements become a part of the realty. *Leland v. Gassett*, 17 Vt. 403.

served as to third parties when it is in their favor, and not prejudicial to their interests. Thus, fixtures that are treated as personalty by the parties may be mortgaged or sold to a third party, and, as mortgagee or vendee, he may enforce his title against the landowner, relying on the agreement;²⁷ but when the rights of third parties are prejudiced by an agreement treating fixtures as personalty, the agreement may or may not be upheld, in accordance with the relationship of the parties. The question arises most frequently between those claiming annexed articles under an agreement and mortgagees or vendees of the realty. This topic has been the subject of fruitful discussion by the courts, and there is an abundance of opinions on the subject. The decisions are not entirely in accord, as may be hereinafter noted.

— (a) **Prior mortgagees of the realty.**

Where there is an agreement between the owner of the realty and the party annexing or owning the chattel to regard it as personalty, and there is at the time a pre-existing mortgage upon the realty, the question of the relative rights

²⁷ A building erected upon the lot of another with his consent, to be removed on notice, is subject to sale and mortgage as personalty. *Brown v. Corbin*, 121 Ind. 455.

An elevator built on land owned by a railroad company under a license, with the right of removal, is subject to sale as personalty. *Deering v. Ladd*, 22 Fed. 575.

A. built an ice house on B.'s land under an oral agreement that it might remain there five years. A. sold the ice house to C. C. then sold it to E. Held, that E. had the right, before the expiration of the five years, to remove the same. *Ham v. Kendall*, 111 Mass. 297.

See *Denham v. Sankey*, 38 Iowa, 269; *Docking v. Frazell*, 34 Kan. 29; *Lanphere v. Lowe*, 3 Neb. 131; *Holt County Bank v. Tootle*, 25 Neb. 408.

of the mortgagee and the party claiming the fixture as a chattel, who may be a conditional vendor, a chattel mortgagee, or a lessor of the chattel annexed, becomes pertinent. Many of the courts, particularly in some late decisions, have strongly asserted the rule that the prior mortgagee, in such a case, has no claim to the fixture annexed under an agreement.²⁸

²⁸ *Boston Safe-Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 36 Fed. 288; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1.

Alabama: *Warren v. Liddell*, 110 Ala. 232; *Broadus v. Smith*, 121 Ala. 335, 26 So. 34.

California: *Tibbetts v. Moore*, 23 Cal. 208.

Delaware: *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192.

Illinois: *Andrews v. Chandler*, 27 Ill. App. 103.

Indiana: *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Iowa: *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541.

Kansas: *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345.

Michigan: *Crippen v. Morrison*, 13 Mich. 23; *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389.

Minnesota: *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491, 59 Minn. 532, 61 N. W. 680, 62 Minn. 204, 64 N. W. 390; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028.

Nebraska: *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765.

New Jersey: *Roddy v. Brick*, 42 N. J. Eq. 218; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279.

New York: *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Brand v. McMahon*, 38 N. Y. St. Rep. 576.

North Carolina: *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

Pennsylvania: *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

South Carolina: *Padgett v. Cleveland*, 33 S. C. 339.

Texas: *McJunkin v. Dupree*, 44 Tex. 500.

For this the equitable reason is advanced that the mortgagee has not been misled by the agreement, nor advanced anything upon the faith of it, nor has his security been impaired by reason thereof, and hence he ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation.²⁹

Vermont: *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *Page v. Edwards*, 64 Vt. 124.

Washington: *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

²⁹ "It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty; but this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance; but the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence, in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not of itself make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to

Then, again, a further equitable reason is given that the mortgage attaches to only such property or interests in property as the mortgagor himself acquires, and therefore chattels that are placed upon land under agreements as aforementioned pass to the prior mortgagee under the same conditions, and subject to the same liens, as when in the mortgagor's hands.³⁰ In Massachusetts, however, following the

the intention of the party making the annexation." *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 823.

³⁰ The equitable preservation of the lien of a chattel mortgagee over that of a prior mortgagee of the realty whereon a mortgaged chattel is subsequently annexed is distinctly set forth as a ground of decision in the able opinion of Reed, J., in the case of *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, as follows: "But, as already observed, the real-estate mortgagees in the present case held their lien before the attachment to the realty of the mortgaged chattels. It is true that, by force of the annexation, they would become subjected to the lien of the real-estate mortgage absolutely, unless the lien of the chattel mortgagee intervenes. * * * The real-estate mortgagee had no assurance, at the time he took his mortgage, that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is, therefore, no inequity towards the prior real-estate mortgagee, and there is equity toward the mortgagee of the chattels in protecting the lien of the latter to its full extent, so far as it will not diminish the original security of the former. As already remarked, the real-estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien of the prior real-estate mortgagee, but the value of his interest was the value of the property

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analogy of the common law, where a mortgage is treated more as a conveyance, and not merely as a security for a loan, and in Wisconsin, New York, and several other states, the courts, under the old rule, consider annexations of chattels made subsequent to a mortgage upon the realty subject to the mortgage, irrespective of the agreement of the parties making the annexation.³¹ There are, again, a class of cases, par-

subjected to the lien. The supreme court of the United States has enunciated a rule which I regard as analogous to the one now propounded. * * * The doctrine announced is that the mortgage attaches itself to the property in the condition in which it comes to the mortgagor's hands. In the language of Justice Bradley, in the case of *United States v. New Orleans R. Co.*, 12 Wall. (U. S.) 362, it only attaches to such interest as the mortgagor acquires. * * * This rule was followed in *Fosdick v. Schall*, 99 U. S. 235."

³¹ *Waterwheels* are subject to a prior mortgage of the realty to which they are attached, notwithstanding a contract by which the seller undertakes to retain title until they are paid for. *Clary v. Owen*, 15 Gray (Mass.) 522. In this case the court said: "We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything, to be attached to the freehold, which, as between mortgagor and mortgagee, would become a part of the realty."

In *Hunt v. Bay State Iron Co.*, 97 Mass. 279, where iron rails had been affixed to a roadbed under an agreement that they should remain personalty, it was held that the agreement was ineffectual as against prior mortgagees of the realty who were not parties thereto.

So, in *Thompson v. Vinton*, 121 Mass. 139, it was decided that a mortgagor of the realty cannot, by any agreement made as to fixtures thereafter attached, prevent them from becoming subject to the prior real-estate mortgage.

An agreement that a building moved upon mortgaged premises should remain personal property is ineffective as against a prior mortgagee of the realty. *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819.

ticularly the federal cases, which seem to adopt a middle ground by considering that if the chattel annexed is capable

See *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350.

And New York seems to follow Massachusetts in the case of *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446, where a father, who owned certain real estate, upon which he had placed a mortgage, afterwards orally agreed with his son that he might take possession, and that all improvements and buildings placed upon the premises by the son should remain personalty, it was held, as to certain machinery and buildings which the son had placed upon the land, that the agreement was ineffective against the prior mortgagee. But see *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042.

So, in Indiana, in the case of *Bass Foundry & Mach. Works v. Gallentine*, 99 Ind. 525, machinery for a mill, sold under an agreement that the title should not pass until it was paid for, was held subject to an existing mortgage on the premises, so as to pass on foreclosure to a purchaser of the land without notice of this contract. See, also, *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593. But see *Binkley v. Forkner*, 117 Ind. 185.

In Wisconsin, in the case of *Frankland v. Moulton*, 5 Wis. 1, where the owner of a steam engine sold the same to an owner of land which was mortgaged, and assisted in annexing it to the realty, reserving a chattel mortgage for a part of the purchase price, it was held that the chattel mortgage was ineffectual against the prior equitable mortgage of the realty.

"The lien of the plaintiff's mortgage covered all that had become realty before or at the time it was executed, and all subsequent accessions to the realty, unless, by a valid agreement to which it was a party, the character of personal estate was impressed thereon." *Homestead Land Co. v. Becker*, 96 Wis. 210, 71 N. W. 117.

Neither an agreement between a seller and purchaser of personal property that the title shall remain in the seller until the price is paid, nor the recording of such agreement, will prevent the property from passing under a previously existing mortgage of real estate to which it is attached, unless the mortgagee is a party to the agreement. *Evans v. Kister*, 35 C. C. A. 28, 92 Fed. 828.

So, in a late case,—*Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85

of removal without materially injuring the realty or itself, and is not a necessary constituent part of the rounded completeness of the freehold, then an agreement such as aforementioned will be effective as against a prior mortgagee.³²

N. W. 698,—where a hot-air furnace plant was installed in a mortgagor's building upon the express agreement that title thereto should not pass from the vendor until same was paid for, and with a right of removal, the Wisconsin court, in line with its previous decisions, held that this agreement was ineffective as against a prior mortgagee of the premises, irrespective of the question of injury by removal. The court, however, admitted that the opposite holding is the more equitable, and supported by the greater weight of authorities.

In Rhode Island, the Massachusetts rule apparently obtains. Thus, in *McCrillis v. Cole* (R. I.; 1903) 55 Atl. 196, where the owner of the land entered into an agreement to sell the same and to erect a mill thereon, the vendee agreeing to furnish, among other materials, an engine and boiler for the mill, which, by the agreement, was to be considered as a part of the real estate, and where the vendee purchased the engine of the defendant, and annexed the same to the realty under a conditional agreement that the engine should remain the property of the seller until paid for, it was held that the owner of the land, being equitably a mortgagee, could claim the engine as a part of the realty. See, also, *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806.

³² This distinction is set forth in the case of *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210, where a bridge company constructed bridges for a railway under an agreement that they should remain the property of the bridge company until the contract price was fully paid. The court, in holding that this agreement was inoperative against a prior mortgage upon the railroad, said: "Whatever is the rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affix-

This proposition seems to beg the question somewhat, for it encroaches upon the very backbone principle of an irremovable fixture, agreement or no agreement.

In the foregoing statements it has been assumed that the agreements of the parties were made without the concurrent consent of the prior mortgagee. Where the mortgagee gives his assent, either express or implied, to the annexation of a chattel to the mortgaged premises, with the understanding that the same shall remain personalty, he is bound by the agreement.³³

ed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case." Citing *Dunham v. Cincinnati, P & C. Ry. Co.*, 1 Wall. (U. S.) 254; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 482; *United States v. New Orleans R. Co.*, 12 Wall. (U. S.) 365; *Dillon v. Barnard*, 21 Wall. (U. S.) 440; *Fosdick v. Schall*, 99 U. S. 251. From the facts of the case and the cases cited it may be inferred that the court in this case had in mind, not so much the principle of fixtures as applicable between mortgagor and mortgagee, and the effect of an agreement in this relation, as the consideration of the property being an integral part of the realty, and, if a fixture at all, as irremovable, and not subject to any agreement. Subsequent federal cases, in approving this case, have practically adopted the rule which obtains in Massachusetts and other states as above stated. See *Phoenix Iron-Works Co. v. New York Security & Trust Co.*, 28 C. C. A. 76, 83 Fed. 757, 54 U. S. App. 408. See criticism in *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. See, also, *Binkley v. Forkner*, 117 Ind. 176; *Hurxthal's Ex'r v. Hurxthal's Heirs*, 45 W. Va. 584, 32 S. E. 237.

³³ *Hawkins v. Hersey*, 86 Me. 394; *Bartholomew v. Hamilton*, 105 Mass. 239; *Yater v. Mullen*, 23 Ind. 562; *Sheldon v. Edwards*, 35 N. Y. 279.

— (b) Subsequent vendees and mortgagees of the realty.

Upon the question whether the ordinary character of property can be changed by agreement from realty to personalty as against a subsequent *bona fide* purchaser or mortgagee of the land without notice, there is not entire harmony of authority; but the better weight of judicial opinion seems to be that such a purchaser or vendee must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the law requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for fraud, and introduce uncertainty and confusion into land titles.³⁴ A further reason for this rule is advanced,—that

³⁴ The rule is stated in *Davenport v. Shants*, 43 Vt. 546: "When a person sells machinery under a condition that it shall remain the property of the vendor until the price is paid, but it is of such a character that, when it is put in place in a mill, it would pass under a mortgage of the real estate, and the vendor had reason to suppose it would be, and it was, so placed before it was paid for, held, that the equity of a subsequent mortgagee, without notice of the vendor's claim, and in reliance upon the vendor's title being absolute, is paramount to that of the conditional vendor."

California: *McNally v. Connally*, 70 Cal. 3, 11 Pac. 320; *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680.

Connecticut: *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Landon v. Platt*, 34 Conn. 517.

Illinois: *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166; *Kaestner v. Day*, 65 Ill. App. 623.

Indiana: *Binkley v. Forkner*, 117 Ind. 183, 19 N. E. 753, 3 L. R. A. 33.

Iowa: *Bringholff v. Munzenmaier*, 20 Iowa, 513; *Stillman v. Flen-*
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it would be inequitable to allow the original vendor of chattels, who had put it in the power of a grantor or mortgagor to annex chattels so as to become a part of the realty,

niken, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *Dostal v. McCaddon*, 35 Iowa, 318; *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541.

Kansas: *Rowand v. Anderson*, 33 Kan. 264, 52 Am. Rep. 529; *Docking v. Frazell*, 34 Kan. 29.

Massachusetts: *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 139; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Southbridge Sav. Bank v. Stevens Tool Co.*, 130 Mass. 547; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 521, 15 Am. St. Rep. 235; *Pierce v. George*, 108 Mass. 78; *Wentworth v. S. A. Woods Mach. Co.*, 163 Mass. 28, 39 N. E. 414; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819.

Michigan: *Stevens v. Rose*, 69 Mich. 259; *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375; *Watson v. Alberts*, 120 Mich. 508, 79 N. W. 1048; *Knowlton v. Johnson*, 37 Mich. 47.

Missouri: *Houx v. Seat*, 26 Mo. 178; *Climer v. Wallace*, 28 Mo. 557, 75 Am. Dec. 135.

Nebraska: *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 679; *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765.

New Hampshire: *Haven v. Emery*, 33 N. H. 69; *Corey v. Bishop*, 48 N. H. 146; *Langdon v. Buchanan*, 62 N. H. 657; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56; *Cochran v. Flint*, 57 N. H. 514; *Carroll v. McCullough*, 63 N. H. 95.

New Jersey: *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889.

New York: *Rowland v. West*, 62 Hun, 583; *Fryatt v. Sullivan Co.*, 5 Hill, 116, affirmed 7 Hill, 529.

Ohio: *Brennan v. Whitaker*, 15 Ohio St. 446; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493.

Oregon: *Muir v. Jones*, 23 Ore. 332, 31 Pac. 646, 19 L. R. A. 441.

Pennsylvania: *Thropp's Appeal*, 70 Pa. 395.

Texas: *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, (156)

to claim them as such against a subsequent *bona fide* vendee or mortgagee of the land, who, by diligent inquiry in searching the records pertaining to land, has been unable to find any defect in the title.³⁵ But this rule is

15 Tex. Civ. App. 694, 41 S. W. 835; *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 273.

Vermont: *Powers v. Dennison*, 30 Vt. 752; *Buzzell v. Cummings*, 61 Vt. 213; *Cross v. Marston*, 17 Vt. 540, 44 Am. Dec. 353.

Washington: *Wade v. Donau Brew. Co.*, 10 Wash. 284, 38 Pac. 1009.

Wisconsin: *Wescott v. Delano*, 20 Wis. 541.

³⁵ "When the vendor sells machinery which it is well understood may, and, in the absence of agreement, does, become part of the realty by being so attached that it cannot be removed without injury, and thereby places it in the power of his vendee to so attach it, and sell or mortgage to innocent third parties, the better and more just rule is that he must suffer." *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375.

The vendor, having put it in the power of the vendee to attach the chattels as irremovable fixtures, and, as such, to sell to innocent purchasers, is not in a situation to complain. *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541.

In *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 615, where a party claimed a house erected upon the land of another with his consent as a chattel against a subsequent *bona fide* purchaser of the realty, the court said: "The policy of our law is that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new mode of conveyance to prevail, incumbrances might frequently be found to exist against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If

not conceded by the courts of several states, even though the purchaser or mortgagee is without notice, actual or constructive;³⁶ and this, upon the ground that the equities

a loss is to be sustained, it is more reasonable that he who neglected the means the law put into his power should suffer, rather than he who has used those means."

In *Binkley v. Forkner*, 117 Ind. 186, the court said: "As to the holder of a chattel mortgage who consents to have the mortgaged chattels placed in such an attitude in relation to real estate as that subsequent innocent purchasers and mortgagees are liable to be misled by the owner of the land to which they are annexed, there seems to be no equitable ground upon which his title should be enforced as against such purchasers or mortgagees."

In *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, the court observes: "It will be observed that the question now presented differs radically from that which would have arisen had the real-estate mortgage been executed subsequent to the annexation of the chattels. As between a lienor who consents to have the subject-matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable ground upon which the lien should be recognized against an innocent subsequent mortgagee or purchaser for value. The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real-estate purchaser would not be regarded as a bona fide purchaser, against whom the chattel mortgage would be void."

³⁶ In Maine, in *Fifield v. Maine Cent. R. Co.*, 62 Me. 77, the court says: "The case of *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254, and subsequent cases, establish the doctrine here that bona fide purchasers, who, even without notice, acquire title to land, are not entitled to claim such structures as a house, store, or mill standing on the land at the time of purchase, if such buildings were at such time the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell v. Richards* does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decisions is rather opposed to it." So, in *Peaks v. Hutchinson*, 96 Me. 530, the court says: "*Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Hilborne v. Brown*, 12 (158)

of an original vendor of a chattel are at least equal to those of a subsequent vendee or mortgagee, and, when he has practiced no fraud, his title cannot be divested by the mere act of conveyance.³⁷ This latter proposition, how-

Me. 162, and *Tapley v. Smith*, 18 Me. 12, established the principle that a building erected by one man on the land of another, by his permission, remains the personal property of him who erects it, and does not pass by a conveyance of the land to a third person, although from its character, purpose, and mode of use it appears to be a part of the realty, and the conveyance is to a bona fide purchaser without notice. These decisions have never been overruled in this state, although it must be admitted that they have been somewhat discredited by the comments of our own court in more recent decisions, and the rule established by them is undoubtedly contrary to the great weight of authority relating to this question." In this case, a stable, 32x28, supported by granite posts set in the ground, was held personalty by agreement, as against a subsequent vendee. The circumstances, however, show a constructive notice on the part of the vendee.

See, also, *Warren v. Liddell*, 110 Ala. 232; *W. T. Adams Mach. Co. v. Interstate Bldg. & Loan Ass'n*, 119 Ala. 97, 24 So. 857; *Russell v. Richards*, 10 Me. 429; *Hilborne v. Brown*, 12 Me. 162; *Tapley v. Smith*, 18 Me. 12; *Godard v. Gould*, 14 Barb. (N. Y.) 662; *Ford v. Cobb*, 20 N. Y. 344; *Mott v. Palmer*, 1 N. Y. 564; *Sayles v. National Water Purifying Co.*, 41 N. Y. St. Rep. 856; *Kerby v. Clapp*, 15 App. Div. (N. Y.) 37; *McLaughlin v. Lester*, 4 N. Y. St. Rep. 852.

³⁷ In *Godard v. Gould*, 14 Barb. (N. Y.) 662, the court said: "Nor does the fact that the defendants are bona fide grantees in the conveyance make any difference. The plaintiffs in no way consented to the conveyance; they have not practiced any fraud on the defendants; their equities are at least equal to those of the defendants; and the recording act has no application to the case. I am not aware of any principle upon which it could be held that the plaintiffs have lost their title. If an owner of land upon which a crop of wheat is growing conveys the land to a bona fide purchaser, the conveyance will transfer the wheat if the grantor owns it, but not if it belongs to a third person."

ever, is subject to the limitation that the annexed chattels must be capable of removal without serious damage to the freehold, or without substantially destroying their own qualities or value.³⁸ This question arises very frequently between conditional vendors or chattel mortgagees of chattels and subsequent vendees or mortgagees of the realty, and, in such cases, the authorities generally follow the rule first announced.³⁹ Where, however, the subsequent vendee or mortgagee of the realty has notice, either actual

³⁸ *Ford v. Cobb*, 20 N. Y. 344; *Fortman v. Goepper*, 14 Ohio St. 558; *Sheldon v. Edwards*, 35 N. Y. 283; *Eaves v. Estes*, 10 Kan. 314.

³⁹ In *Ridgeway Stove Co. v. Way*, 141 Mass. 557, where a portable furnace was put into a house under an agreement that the same should remain the property of the vendor until paid for, the fact of such an agreement, as against a bona fide purchaser for value, is immaterial unless the purchaser had notice; for, notwithstanding such an agreement, the property annexed to the realty will pass to an innocent purchaser without notice. Likewise, the same ruling is upheld as between a conditional vendor and a subsequent mortgagee of the realty. *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 139.

In *Pierce v. George*, 108 Mass. 78, a chattel mortgage taken upon certain machinery, the parties knowing that the machinery was to be fastened to a building, was ineffective against a subsequent mortgagee of the realty.

A bona fide purchaser of the realty, whereon is mill machinery so attached as to be a part thereof, will take the same as against a conditional vendor, retaining title thereto as security for payment of the purchase price. *Knowlton v. Johnson*, 37 Mich. 47; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289.

As against a bona fide creditor holding a trust deed executed after the annexation of machinery to a shoe factory, a conditional vendor cannot claim such machinery as chattels. *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166. See *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375. See, also, 52 Cent. Law J. 480.

or constructive, of any existing agreement treating fixtures as personalty,⁴⁰ or where he does not sustain a strictly

⁴⁰ Alabama: *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56.

Arkansas: *Hensley v. Brodie*, 16 Ark. 511.

Indiana: *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231, 9 L. R. A. 676.

Iowa: *Greither v. Alexander*, 15 Iowa, 470; *Wilgus v. Gettings*, 21 Iowa, 177; *Sowden v. Craig*, 26 Iowa, 164, 96 Am. Dec. 125; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

Maine: *Davis v. Buffum*, 51 Me. 160.

Maryland: *Walker v. Schindel*, 58 Md. 360.

Massachusetts: *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Morris v. French*, 106 Mass. 326; *Ham v. Kendall*, 111 Mass. 297; *Ridgeway Stove Co. v. Way*, 141 Mass. 557.

Michigan: *Crippen v. Morrison*, 13 Mich. 33; *Ingersoll v. Barnes*, 47 Mich. 104; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

Minnesota: *Warner v. Kenning*, 25 Minn. 173; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821.

Mississippi: *Duke v. Shackelford*, 56 Miss. 552; *John Van Range Co. v. Allen (Miss.)* 7 So. 499.

Missouri: *Priestley v. Johnson*, 67 Mo. 632.

Nebraska: *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

New Hampshire: *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 N. H. 66; *Corey v. Bishop*, 48 N. H. 146; *Dame v. Dame*, 38 N. H. 429.

New York: *Sayles v. National Water Purifying Co.*, 16 N. Y. Supp. 555; *Brand v. McMahon*, 15 N. Y. Supp. 39 (the claim of vendor to machinery announced by auctioneer at sale of realty).

North Carolina: *Waller v. Bowling*, 108 N. C. 289; *Causey v. Empire Plaid Mills*, 119 N. C. 180.

Ohio: *Simons v. Pierce*, 16 Ohio St. 215.

Pennsylvania: *Coleman v. Lewis*, 27 Pa. 291; *Mitchell v. Freedley*, 10 Pa. 198.

South Carolina: *Sullivan v. Jones*, 14 S. C. 362; *Dominick v. Farr*, 22 S. C. 585.

In *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. 19, 3 C. C. A.

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bona fide relation to the parties concerned,⁴¹ he is placed in the same situation, and subject to the same equities, as the original parties to the agreement.

What constitutes notice is an important question, upon which there is a lack of harmony in the decisions. It seems that actual notice, imparted directly, or readily ascertainable from the instrument of conveyance or mortgage, is always effective in destroying the *bona fide* character of a subsequent mortgagee or vendee of the realty.⁴² Upon the question of constructive notice, as to whether the recording of a chattel mortgage or a conditional sale of a chattel is effective as notice to a subsequent vendee or mortgagee of the realty, the courts are at variance. Some hold that such a recording cannot be construed to give constructive notice

399, the appellant water company, being composed of the members of a firm which had bought engines of the Holly Company, conveyed the land on which the engines were placed to the water company, by reason whereof the company was charged with notice.

⁴¹ In the case of *Cherry v. Arthur*, 5 Wash. 787, mortgagees of real estate, not for value, but to secure a pre-existing debt, were held not to be in the same position as mortgagees for value in claiming chattels annexed to the freehold, as against a conditional vendor of the same.

⁴² A real-estate mortgage, by its terms, may give notice of an existing agreement as to chattels annexed. Thus, in *Binkley v. Forkner*, 117 Ind. 186, where certain machinery, in a real-estate mortgage, was expressly and separately mortgaged, and the statement made that it should not be removed until the mortgage was satisfied, the court held that this feature of the mortgage was meaningless unless interpreted in the sense that the parties meant to consider the machinery as different from realty, viz., personalty.

A purchaser of realty with oral notice of the claims of a third party as to corncribs thereon is in no better position than the original vendor. *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 659.

to subsequent vendees and mortgagees of the realty, and that the latter cannot be compelled to search the records of personal property in town clerks' offices, in addition to the records of real estate in the register of deeds' office.⁴³

⁴³ In *Tibbetts v. Horne*, 65 N. H. 242, 23 Am. St. Rep. 31, where the vendor of machinery, having taken back a chattel mortgage for the purchase price of machinery which was annexed to the realty, attempted to claim the same against a subsequent mortgagee of the realty, the court said: "Between the defendant, a mortgagee of chattels, who authorized their annexation to the mortgagor's mill, and the plaintiff, a subsequent mortgagee of the mill, who had no notice, actual or constructive, that the defendant claimed a lien on an apparent part of the mill, the question of right is determined by the registry law. The defendant, as mortgagee of chattels, has the rights of a purchaser holding a recorded title of personalty. The plaintiff, as mortgagee of the land, has the rights of a purchaser of real estate. The public records of chattel mortgages and land titles are an important protection of purchasers. Constructive notice is not given by the record of a chattel mortgage in the county registry of deeds, or by the record of a realty mortgage in the town clerk's office. Before taking a mortgage of the land, the plaintiff was not bound to examine the record of chattel mortgages for the title of machinery that was annexed to the land in a manner that made it apparently as much a part of the land as the removable doors and windows of the mill. The defendant, being bound to know this, should have taken a mortgage of the land or other security consistent with the safety intended to be given to innocent purchasers by the registry laws. By taking no mortgage of the realty of which, with his assent, the machinery became an apparent part, he gave Waterhouse and Frost apparent authority to convey the machinery as realty. The purpose of the registry law would be defeated if the county record could not be relied upon in such a case by a subsequent purchaser having no notice of a defect in the apparent title. The town record not being constructive notice of such a defect, the defendant's chattel mortgage became a secret claim when the annexation of the machinery to the land had referred all inquirers to the registry of land titles for information."

So, the filing of a chattel mortgage is not constructive notice to a

Other courts so construe their registry laws as to give constructive notice, by the recording of a chattel mortgage or conditional sale, to all classes of persons, whether purchasers of real estate or not.⁴⁴

— (c) Purchasers at an execution sale.

It appears that purchasers at an execution sale do not stand in the relation of a *bona fide* purchaser without notice, but they acquire only the rights which the original debtor had, and hence are subject to an agreement treating chattels annexed as personal property.⁴⁵ But in Iowa, a purchaser

subsequent *bona fide* vendee of the realty. *Bringholff v. Munzenmaier*, 20 Iowa, 517.

⁴⁴ Thus, in *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125, the constructive notice given by recording a chattel mortgage which was executed upon certain engines, boilers, and saws, and recorded before their annexation to the realty, was held effective as actual notice to a defendant purchaser at an execution sale to enforce a mechanic's lien. The court there says: "The notice imparted by the due and proper record of such an instrument, though called a 'constructive notice,' is just as effectual for the protection of the rights of the parties as an actual notice by the word of mouth, or otherwise. Any other construction of our registry laws would effectually nullify them."

Under the laws of the state of Illinois, chattel mortgages duly recorded and acknowledged give constructive notice to all subsequent purchasers and incumbrancers of the vendor's rights, even though the chattels are so attached to the real estate as to ordinarily become a part thereof. *Craig v. Dimock*, 47 Ill. 319; *Sword v. Low*, 122 Ill. 487; *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166. See *Ford v. Cobb*, 20 N. Y. 344; *Rowland v. West*, 62 Hun (N. Y.) 583.

⁴⁵ In *Manwaring v. Jenison*, 61 Mich. 117, where a chattel mortgage was given upon machinery which had previously been annexed to the realty, it was held that the same did not pass to an execution purchaser.

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at a sheriff's sale is apparently placed in the same position as a purchaser from the owner, and hence not affected by an agreement of which he had no notice.⁴⁶

chaser of the realty. In this case, however, the purchaser had actual notice of the claims of the mortgagee before he purchased. The court here said: "The purchaser under the execution sale does not stand in the relation of a bona fide purchaser of the land without notice of the rights of the plaintiff. He only took, by his levy, the same title his judgment debtor had."

So, in *Sisson v. Hibbard*, 75 N. Y. 542, where an engine and boiler were set up in a building for the purpose of manufacturing staves, and was so annexed as to ordinarily become a part of the realty, and a chattel mortgage had been executed thereon to secure the purchase price by the owner of the land, it was held that an execution purchaser of the realty could not claim the same as against the mortgagees for the reason that he was not a bona fide purchaser, but simply a purchaser under an execution sale, acquiring only the rights of the original vendee.

See *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

A purchaser at a judicial sale is subject to the claims of a third party, who is a conditional vendor. *Sayles v. National Water Purifying Co.*, 41 N. Y. St. Rep. 856.

⁴⁶ In *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120, a smutter lent to the owner of a grist mill, and fastened therein so as to become a part of the realty, passed to a purchaser at a sheriff's sale without any notice of the facts.

So, in *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, where wagon scales were attached to the realty, the vendor thereof retaining title to the same until paid for, it was held that a purchaser of the realty at a sheriff's sale acquired the scales as against the conditional vendor. The court said: "The plaintiff as purchaser at the sheriff's sale had no notice of the intervener's claim to the wagon scales until after he had taken possession of the premises under the sheriff's deed. He then acquired precisely the same right to the fixtures under the deed as though he had bought directly from the defendant, and, conceding the sale of the scales by intervener to defendant to have been conditioned as contended, this

— (d) Judgment lienors.

Judgment lienors apparently do not stand in any better position than the original parties to an agreement treating fixtures as personalty. In an Indiana case⁴⁷ it is asserted that the mere fact of a naked judgment lien existing against the owner of the real estate did not change the character of property placed thereon, and treated as personalty, and the owner of such fixtures was not obliged to consult the judgment lienor in order to get his consent to the erection of machinery on the real estate, under an agreement that the same should remain personalty.

— (e) Liens of vendors.

An agreement made with a vendee in possession of real estate, regarding chattels annexed to the same during his occupancy as personalty, is effective as against a vendor or other person holding a lien on the land for the purchase

would not affect the title of a third party buying in good faith without notice."

⁴⁷ *Young v. Baxter*, 55 Ind. 188. In this case a stationary mill was affixed to the realty for manufacturing purposes, under an agreement that the same should remain personalty. As against a judgment lienor of the land, the court said: "The mere fact that the appellant [lienors] had judgments against the owner of the real estate, which were naked liens thereon, would not change the character of the property, nor make the owner of the realty own more and more valuable property than he would own without those liens. The existence of appellant's liens on said real estate did not make it necessary that the owners of the boiler, engine, and mill machinery should consult the appellant and get his consent to the erection of those articles on said real estate, or his agreement that the articles in question, when so erected, should be treated and regarded as personal property."

price, if the annexed chattels are removable without material injury to the realty.⁴⁸

— (f) Vendors giving contract to convey.

So, ordinarily, an agreement as to the character of annexed chattels is binding upon a vendor who has given to the vendee a contract to convey upon the payment of a certain price, or performance of some other condition. Such a vendor is not regarded as standing in a *bona fide* relation.⁴⁹

⁴⁸ *Miller v. Wilson*, 71 Iowa, 610; *Perkins v. Swanik*, 43 Miss. 349; *Willis v. Munger Improved Cotton Mach. Mfg. Co.*, 13 Tex. Civ. App. 677. But in *Hunt v. Bay State Iron Co.*, 97 Mass. 279, where railroad rails were laid upon a roadbed under an agreement that they should remain personal property until paid for, as against prior mortgagees of the land and landowners holding a lien on the land for damages, it was decided, in accordance with their ruling in favor of the prior mortgagee, that the agreement was binding only so far as the parties had notice of the same.

⁴⁹ In *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107, the defendants, the owners of certain real estate, had made a contract to convey the same with one Lampson, stipulating in the contract that, upon nonpayment of a certain price, the premises, with all improvements thereon, should revert to the defendants. Lampson leased, with the privilege of purchase, an engine and boiler, and attached the same to the land. In an action by the lessor of the machinery, it was held that the defendants could not claim the same as a part of the realty, as they were not *bona fide* parties, but were subject to the same equities as Lampson.

So, in *Burrill v. S. N. Wilcox Lumber Co.*, 65 Mich. 571, the defendant sold land upon a contract to convey, and the vendee in possession attached to the realty a portable saw mill, upon which the plaintiff had a chattel mortgage. Held, that the character of personality fixed by the mortgage continued against the vendor of the land.

But in *Brannon v. Vaughan*, 66 Ark. 87, 48 S. W. 909, a vendor, having given a conditional contract to convey realty, was not bound

Often such a contract vendor is an equitable mortgagee of the realty, and, as such, subject to the general rule announced for prior mortgagees of the realty, and for the same reason.⁵⁰

— (g) Purchaser at foreclosure of trust deed.

A purchaser at a foreclosure sale of a trust deed appears to occupy the position of a *bona fide* subsequent vendee of the realty.⁵¹

— (h) Liens of mechanics.

The law applicable to mechanics' liens is, at present, by an agreement between the vendee in possession and a third party treating a building erected upon the premises as personal property, when the same was an addition to another building, and could not be removed without occasioning great injury to the premises.

⁵⁰ In the case of *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389, where machines were sold by a vendor upon the express stipulation that title thereto should not pass until they were paid for, and where the vendee placed the same in a building upon realty which he had purchased under a contract to convey, with the right in the grantor to take the property and all the improvements upon default in payment of purchase price, it was held that, as between the conditional vendor and the grantor or contract vendor of the realty, the machines were personalty, for the contract vendor stood in the position of an equitable mortgagee, and, like a prior mortgagee, he did not take his security upon the faith that these machines were a part of the realty. See *supra*, this chapter, § 29a, "Prior Mortgagees of the Realty."

⁵¹ In *Union Cent. Life Ins. Co. v. Tillery*, 152 Mo. 421, 54 S. W. 220, the defendant, while a tenant, erected buildings upon the leased premises under an agreement with the landlord that he might remove the same upon the termination of his lease. The plaintiff, who acquired the premises through purchase at a foreclosure of a trust deed given by the landlord, was held to be unaffected by the agreement.

largely statutory, and, accordingly, varies greatly in the different states. However, in those states where a mechanic's lien does not apply to fixtures and improvements apart from the land, and except as being real estate, agreements treating annexed chattels as personal property are ordinarily effective in preventing the attachment of mechanics' liens upon the chattels annexed.⁵² Thus, an agreement between a lessor and a lessee treating articles annexed as personalty, and giving the right of removal, will bar the attachment of a mechanic's lien thereto.⁵³ So, a chattel mortgage given upon chattels before their annexation to the realty prevents the attachment of a mechanic's lien as against a chattel mortgagee.⁵⁴ But where a lessee in possession, holding

⁵² Where a lease of land contains nothing to put third persons on notice that buildings to be erected thereon by the tenants will not inure to the benefit of the landlord, and become a part of the realty, the landlord, who has stood by and has seen the tenants erect a large and costly building on the land without giving any notice that he will not be responsible for the same, cannot be heard to say that the tenants have the right to remove the building at the expiration of their term, and thereby deprive materialmen of their lien on his land for materials furnished. *Richardson v. Koch*, 81 Mo. 264. See, also, *Boisot, Mechanics' Liens*, § 295; *West Coast Lumber Co. v. Apfield*, 86 Cal. 335, 24 Pac. 993.

In Pennsylvania, trade fixtures and buildings removable by the tenant have been held not subject to the mechanic's lien under the statute. *Haworth v. Wallace*, 14 Pa. 118; *Church v. Griffith*, 9 Pa. 117; *In re White's Appeal*, 10 Pa. 252; *Collins v. Mott*, 45 Mo. 100; *Koenig v. Mueller*, 39 Mo. 165; *Richardson v. Koch*, 81 Mo. 264.

Furnaces are part of the realty as between owner of the freehold and mechanic's lienor. *Stockwell v. Campbell*, 39 Conn. 362 (portable hot-air furnace); *Thielman v. Carr*, 75 Ill. 385.

⁵³ *White's Appeal*, 10 Pa. 252; *Collins v. Mott*, 45 Mo. 100; *West Coast Lumber Co. v. Apfield*, 86 Cal. 335.

⁵⁴ *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125.

the realty under an agreement with the lessor giving him the right to remove all fixtures erected by him, attaches to the freehold machinery furnished by a materialman, the attached machinery is not only subject to the lien of the mechanic, but also the estate of the lessor.⁵⁵

—— (i) Lessors of land.

So, a lessor of land is bound by the agreement of the lessee with a third party, treating articles sold by that party to the lessee, and annexed to the realty, as personalty.⁵⁶

⁵⁵ *Dobschuetz v. Holliday*, 82 Ill. 371; *Church v. Griffith*, 9 Pa. 117; *McGreary v. Osborne*, 9 Cal. 119; *Hart v. Globe Iron Works*, 37 Ohio St. 75; *Hammer v. Johnson*, 44 Ill. 192.

⁵⁶ In *Hewitt v. General Electric Co.*, 164 Ill. 420, where a lessee attached certain mining machinery to the realty of the lessor, but so as to be removable without injury to the premises, and he had executed a chattel mortgage to the vendor, wherein it provided that the machinery should not become a part of the realty, it was held that the character of the property as evidenced by the chattel mortgage was maintained as against a lessor. But of course such an agreement is not effective where the articles are so attached as to be not removable without serious injury to the freehold. *Cross v. Weare Commission Co.*, 153 Ill. 512; *Docking v. Frazell*, 34 Kan. 29. See, also, *Medicke v. Sauer*, 61 Minn. 15; *Metropolitan Concert Co. v. Sperry*, 9 N. Y. St. Rep. 342; *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153.

CHAPTER VI.

FIXTURES AS BETWEEN LANDLORD AND TENANT.

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§ 30. General rule.

The general rule of law applicable to fixtures is always construed with much greater latitude and indulgence between landlord and tenant in favor of the tenant than between any other class of persons. Under the history of the law of fixtures¹ it has been seen how the old, strict rule of the common law was gradually modified and excepted to in favor of the tenant,—how, first, an exception was made in favor of the tenant, out of considerations of public policy, as to fixtures devoted to purposes of trade, then extended to fixtures used for purposes of domestic convenience, and, finally, to annexed articles of ornament. In this respect, the general rule is, in the absence of a special agreement, that the tenant is permitted to remove all his erections and annexations of chattels to the realty of his landlord which were so placed for purposes of trade, domestic convenience, or for ornamental uses, provided that such annexed articles are removable without material injury to the freehold, or to the essential characteristics of themselves.² The original ground for these exceptions arose from

¹ See chapter 2.

² Ewell, *Fixtures*, p. 96; Tyler, *Fixtures*, p. 150; Taylor, *Landlord & Tenant*, § 544; *Elwes v. Maw*, 3 East, 38; *Wall v. Hinds*, 4 Gray (172)

the desire to foster trade and commerce, and the subsequent exceptions in favor of domestic and ornamental fixtures were founded upon reasons of public policy; for, manifestly, a tenant annexes his domestic and ornamental fixtures merely for purposes of temporary convenience, and a rule that would pass to the landlord such fixtures the moment that they are annexed would work great hardship to tenants, without any practical advantages to landlords.³

§ 31. Nature and application of the rule.

This rule of law, as especially applied between landlord and tenant, has reference only to what might be termed the "tenant's removable fixtures," and should not be confused with the right of a tenant to remove annexed chattels which are purely chattels. Thus, all those articles annexed by the tenant which, from the application of the recognized tests in the law of fixtures, could not be said to have become a part of the realty, are personal property, and, as such, are removable, absolutely, by the tenant, the same as by other persons standing in different relations to the owner of the realty.^{3a} But chattels which are so attached to the

(Mass.) 270, 64 Am. Dec. 64; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Murray v. Moross*, 27 Mich. 203; *Friedlander v. Ryder*, 30 Neb. 783; *Chase v. New York Insulated Wire Co.*, 57 Ill. App. 205; *Collamore v. Gillis*, 149 Mass. 578.

The cases are not in harmony in respect to the provisions that annexed chattels must be removed without injury to the premises or to themselves. See post, chapter 6, § 33, "Trade Fixtures."

³ *Poole's Case*, 1 Salk. 368; *Seeger v. Pettit*, 77 Pa. 440; *Ewell, Fixtures*, p. 127; *Wall v. Hinds*, 4 Gray (Mass.) 270, 64 Am. Dec. 64.

^{3a} See ante, c. 3, "Requisites and Tests of a Fixture." Thus, a blacksmith shop moved to a farm by a tenant for temporary use,

freehold by the tenant for trade, domestic, or ornamental purposes as ordinarily, under the law of fixtures, to become a part of the realty, are nevertheless, under certain conditions and circumstances, removable by the tenant. These chattels are properly the tenant's removable fixtures, and, by the weight of authority, are considered as realty until severed,⁴ although there is a noticeable lack of har-

and resting on the runners by means of which it was hauled to the farm, is personal property. *Smyth v. Stoddard*, 203 Ill. 424.

⁴ In *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745, Gray, J., said: "Fixtures annexed to real estate become part of it. * * * If annexed by a tenant for purposes of trade, or some other immediate or temporary uses, or for ornament, he may, indeed, while remaining in possession, sever them from the land, and thus change their character back again from realty to personalty; but if, without having done so, he voluntarily quits the premises at the expiration of his term, without any special agreement with his landlord, neither he nor his vendee can afterwards claim them against the owner of the land."

"For many, if not most, purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet, until so severed, it remains a part of the realty." *Ewell*, *Fixtures*, p. 77, and notes there cited.

An oyster and trench counter and a bar nailed to the floor are a part of the realty so long as annexed. *Guthrie v. Jones*, 108 Mass. 191.

So, a counting room built within a store, and a trade fixture, is a part of the realty so long as annexed to the freehold. *Brown v. Wallis*, 115 Mass. 158.

See *Raddin v. Arnold*, 116 Mass. 270; *Freeman v. Dawson*, 110 U. S. 270; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *Treadway v. Sharon*, 7 Nev. 37; *Stout v. Stoppel*, 30 Minn. 56; *Pemberton v. King*, 13 N. C. (2 Dev.) 376; *Donnelly v. Thieben*, 9 Ill. App. 495; *Preston v. Briggs*, 16 Vt. 129; *Darrah v. Baird*, 101 Pa. 265.

In *Griffin v. Ransdell*, 71 Ind. 440, it was held that a dwelling (174)

mony and a variance of opinion in the decisions upon this point.⁵ The reason assigned for so considering such articles

house erected by the tenant was a part of the realty, as between the landlord and the tenant, and that a third party must show a change in its character in order to maintain a personal action.

So, in *Kile v. Giebner*, 114 Pa. 381, it was held that a stationary saw mill, though a trade fixture because erected by the tenant as accessory to his trade, was a chattel real during the continuance of the term of the tenant.

⁵ There are many decisions treating trade fixtures, while annexed, as personalty, but in many instances the term has been inadvertently applied by reason of the fact that the remedy sought was of a personal kind. On this, Tyler, in his work on Fixtures (page 223), says: "Fixtures of this kind have often been spoken of by courts in the United States as personal property, even while attached to the soil. As they were the personal property of the party attaching them to the soil before they became fixtures, and as he has the right to remove them at any time, and again convert them into personal property, courts have sometimes seen proper to hold them all the time as such. Under this view of the case, actions of trover have been sometimes sustained for fixtures that were never removed or detached from the freehold. In all these cases, the courts call the things which are the subject of litigation personal property; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them."

So, in many New York cases, trade fixtures of a tenant have been considered as the personal property of the tenant. See *Walker v. Sherman*, 20 Wend. 636; *Cook v. Champlain Transp. Co.*, 1 Denio, 91; *Kelsey v. Durkee*, 33 Barb. 410; *Moore v. Wood*, 12 Abb. Pr. 393.

So in Pennsylvania, see *Lemar v. Miles*, 4 Watts, 330; *Hey v. Bruner*, 61 Pa. 87; *Heffner v. Lewis*, 73 Pa. 302; *Watts v. Lehman*, 107 Pa. 106; *Kile v. Giebner*, 114 Pa. 381.

"It seems clear, upon principles well founded in reason and public policy, that the rule of law is well established that buildings placed upon leased premises by the tenant, to be used for the purpose of trade and business, are in law deemed personal property, and may be mortgaged as chattels, or levied on as personalty, and sold upon execution, and that the purchaser at such sale has the right to enter

a part of the realty is that the tenant indicates, by the mode in which he attaches them, that they are to be a part of the freehold during the continuance of his interest in the

upon the premises to remove them." *Gantt, J., in Lanphere v. Lowe*, 3 Neb. 131. See, also, *Bartlett v. Haviland*, 92 Mich. 552; *Bircher v. Parker*, 43 Mo. 443; *Torrey v. Burnett*, 38 N. J. Law, 457; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138.

So, in regard to railroads, it is held in many cases that they come within the rule regarding trade fixtures, and are therefore not an accessory to the enjoyment of the freehold, nor in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. So, being accessory merely to the business, they must be regarded as personal property. In *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770, the court says: "The general principle to be kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises and the premises, or locus in quo. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to real estate, retain the personal character of the principal, to which they appropriately belong and are subservient." So, in *Northern Central Ry. Co. v. Canton Company of Baltimore*, 30 Md. 347, the court said: "A railway is certainly quite as essential to the trade and business of a railway company as a steam engine, and the house which may cover it, or any other fixture, can be to the miller or the miner.

* * * *Prima facie*, a house with its foundation planted in the soil is real property; yet when it is accessory to trade, and in law a trade fixture, we find all the authorities regard it as personal property." Quoted in *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 394, 48 L. R. A. 241. See, also, *Western North Carolina R. Co. v. Deal*, 90 N. C. 110; *Albion River R. Co. v. Hesser*, 84 Cal. 435, 24 Pac. 288; *Oregon Ry. & Nav. Co. v. Mosier*, 14 Or. 519, 13 Pac. 300, 58 Am. Rep. 321; *Jones v. New Orleans & S. R. Co. & I. Ass'n*, 70 Ala. 227; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28; *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Perkins v. Swank*, 43 Miss. 349.

property.⁶ This distinction is of practical importance in determining the right of a tenant to remove his fixtures after the expiration of his term, or after the surrender of possession,⁷ and, in certain cases, in determining the remedies of trover and replevin.⁸

§ 32. Nature of the tenant's interest.

As to fixtures erected by the tenant upon his lessor's realty, which, from the applied tests of fixtures, are removable at any and all times by the tenant, and are personalty, the tenant, of course, possesses the same right to and interest in the same as in any personal property. But where articles are substantially annexed to the freehold by the tenant for trade, domestic, or ornamental purposes, and are removable by him only within a certain time and under certain circumstances, the nature of his interest is somewhat different. It is not, distinctively, an interest in land, for it is not within the statute of frauds, so as to require a note or memorandum in writing by the tenant in order to pass title to such fixtures to a purchaser.⁹ Yet his interest in such fixtures is not the same as that in an annexed chattel treated as purely personalty, for in all cases the personal actions of trover and replevin will not lie.¹⁰ His interest

⁶ *Boyd v. Shorrock*, L. R. 5 Eq. 78; *Ewell*, Fixtures, p. 32.

⁷ *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Beckwith v. Boyce*, 9 Mo. 560; *State v. Elliot*, 11 N. H. 540.

⁸ *Shapira v. Barney*, 30 Minn. 59; *Davis v. Jones*, 2 Barn. & Ald. 165. See post, chapter 14, § 109, "Trover," and § 110, "Replevin."

⁹ *Hallen v. Runder*, 1 Cromp., M. & R. 266; *Lee v. Gaskell*, 1 Q. B. Div. 700; *South Baltimore Co. v. Muhlbach*, 69 Md. 395.

¹⁰ *Roffey v. Henderson*, 17 Q. B. 574.

is, absolutely, neither an interest in chattels nor an interest in land, but rather it is a chattel interest in things for the time being affixed to land. This interest is peculiar, in that it partakes both of the character of personalty and realty.¹¹ In some aspects, his interest is a defeasible interest in land during the continuance of his term;¹² and his right to remove these fixtures is considered rather as a privilege allowed the tenant, than an absolute right to the things themselves.¹³ The landlord, however, acquires his interest in such fixtures by reason of the fixtures being part and parcel of the land which he owns, and as to him, of course, they are real estate. During the continuance of the tenancy, he possesses a defeasible interest in them as realty; after the termination of the tenancy, and upon their nonremoval, his interest becomes absolute.

It may be stated that, under the present status of the law of fixtures, and the present tendency of the various courts in relation to the same, this distinction in respect to the tenant's interest is rather artificial, and too finely drawn for practical purposes, for the reason that the courts are tending towards a recognition of all removable fixtures as personal property, while annexed, so that the difference is practically now a historical difference, which a few courts still recognize.^{13a}

¹¹ Tyler, Fixtures, p. 165 et seq.

¹² Tyler, Fixtures, p. 166.

¹³ Taylor, in his work on Landlord & Tenant, § 551, speaks of this right of removal of the tenant as a privilege allowed, rather than an absolute right to the things themselves, and, as such, it must be exercised before the tenant's interest expires, or the landlord's defeasible right and title becomes absolute.

^{13a} See ante, c. 6, note. 4.

§ 33. Trade fixtures.

Articles attached to or erected upon the realty by the tenant for the purpose of assisting him in carrying on a trade are removable by him during his tenancy. The rise of this exception to the common-law rule, that whatever is annexed to the soil becomes a part thereof, and hence irremovable, has been discussed in a previous chapter.¹⁴ It is of importance, however, to note that there is a divergence of opinion among the courts as to the application of this rule, and as to what is included within its terms. The English decisions, particularly those of an early date, accorded to the tenant the right to remove his trade fixtures during his term, provided that they were not so annexed as to materially injure the realty in their removal, or to cause the articles themselves to be reduced to a mere mass of crude materials, or to be destroyed.¹⁵ This general principle is followed, in its general tenor, by the American decisions,¹⁶ although there is a considerable respectable author-

¹⁴ See ante, c. 2, "Fixtures Historically Treated."

¹⁵ *Poole's Case*, 1 Salk. 368; *Whitehead v. Bennett*, 27 Law J. Ch. 474, 6 Wkly. Rep. 351; *Martin v. Roe*, 7 El. & Bl. 237. In the last-cited case, in regard to injury by removal, Lord Campbell said: "In all cases of this kind, injury to the freehold must be spoken of with less than literal strictness. A screw or a nail can scarcely be drawn without some attrition; and when all the harm done is that which is unavoidable to the mortar laid on the brick walls, this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle, the criterion of injury to the freehold would be idle."

¹⁶ *Wall v. Hinds*, 4 Gray (Mass.) 271, 64 Am. Dec. 64; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150; *Capen v. Peckham*, 35 Conn. 88; *Linahan v. Barr*, 41 Conn. 471; *Chase v. New York Insulated Wire*

ity giving the right of removal of a trade fixture to a tenant, irrespective of the fact that the articles, by their removal, may lose their essential characteristics as chattels, or be practically destroyed.¹⁷ This holding is upon the princi-

Co., 57 Ill. App. 205; *Roth v. Collins*, 109 Iowa, 501, 80 N. W. 543; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Shapira v. Barney*, 30 Minn. 59, 14 N. W. 270; *Murray v. Moross*, 27 Mich. 203; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008; *Powell v. McAshan*, 28 Mo. 70; *Chandler v. Oldham*, 55 Mo. App. 139; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Ombony v. Jones*, 21 Barb. (N. Y.) 520, affirmed in 19 N. Y. 234; *Conner v. Coffin*, 22 N. H. 538; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Cubbins v. Ayres*, 72 Tenn. (4 Lea) 329; *McDavid v. Wood*, 52 Tenn. (5 Heisk.) 96.

A building and shed that are so erected and so attached to the premises as to be not removable without material injury to the premises are a part of the realty, and irremovable. *Powell v. McAshan*, 28 Mo. 70.

In *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700, it was held that a frame addition, 24x20, two stories in height, placed upon wooden posts set in the ground, and attached to the main building by cutting off the eaves and taking out the windows of the main building, was not removable by the tenant because the addition was "of such a character, and was so annexed to the main building, that its removal would greatly injure the demised premises." The court said: "The modern decisions are to the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession." Citing *Lanphere v. Lowé*, 3 Neb. 131; 1 Washburn, Real Property, c. 1, § 27; *Taylor, Landlord & Tenant*, § 550; *Whiting v. Brastow*, 4 Pick. (Mass.) 311.

And so, a hanging floor in a business house, suspended by iron rods attached to the joists of the floor above, and by joists let into the walls on two sides of the building, was held to be irremovable. *Chase v. New York Insulated Wire Co.*, 57 Ill. App. 205.

¹⁷ In the United States supreme court there is the broad state-

ple that the landlord cannot be affected by injury done by the tenant to his own property, so long as the freehold is not damaged; for the fixture so removed may still be valuable to the

ment in *Van Ness v. Pacard*, 2 Pet. 137, quoted in the text above, and in the case of *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055, the statement is made obiter, that "it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term."

In *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393, a brick chimney sunk three feet into the ground for a foundation, and not removable without being taken down and to pieces, was held to be removable by the tenant.

The court here said: "The rigor of the ancient law of fixtures has yielded, and must continue to yield, to the contingencies of modern times. The law must take notice of trade and manufactures and their wants, and afford to them adequate and appropriate protection."

In *Dostal v. McCaddon*, 35 Iowa, 318, a vault built for banking purposes within a building, and a safe built within the vault, and too large to be removed without tearing down the vault, were both held to be removable as trade fixtures.

So, in *Dubois v. Kelly*, 10 Barb. (N. Y.) 496, a shed, stable, store-room, and barn so erected and built upon and in a side hill as to be removable only upon being taken down, were considered to be trade fixtures. See, also, *Cromie v. Hoover*, 40 Ind. 49; *White's Appeal*, 10 Pa. 252.

In *Baker v. McClurg*, 198 Ill. 28, 59 L. R. A. 131, where the tenants placed, in a building used as a bakery, ovens upon brick foundations of their own, an engine and a boiler, the latter encased in a brick masonry jacket, it was held that the same were removable, as trade fixtures, even though, by the removal, they would be more or less injured, and would have to be taken down in pieces.

But in Massachusetts the English rule is followed. In the case of *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150, where a baker's oven, consisting of about 12,000 bricks, was built into a leased building by the tenant, and was not

tenant, even though he may be put to extra expense to repair or rebuild it.^{17a} Thus, in cases where a brick chimney, a brick vault, a baker's oven, or other chattel must be taken down in pieces in order to effect its removal, the fact of demolition is immaterial so long as the resulting mass is of value and of use for other trade or commercial purposes.¹⁸

Respecting the injury done to the realty by the removal of fixtures erected for trade purposes, there is a noticeable tendency in the decisions to interpret the general rule more freely in cases of trade fixtures than otherwise, and in favor of the tenant. In *Van Ness v. Pacard*,¹⁹ a leading case on the subject of trade fixtures, the court stated, in reference to trade fixtures: "The question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole

capable of removal intact, the court said: "We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed or reduced to a mere mass of crude materials. In the case before us, the oven was not like a machine or a structure, the parts of which are fitted to each other, and can be taken apart and put together again at pleasure in some other place. It had, so to speak, no removable identity, but when taken down it necessarily lost its character as an oven, and, with the exception of the iron lining and door, became mere bricks and mortar."

^{17a} *Baker v. McClurg*, 198 Ill. 28, 59 L. R. A. 131.

¹⁸ *Dostal v. McCaddon*, 35 Iowa, 318; *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393; *Baker v. McClurg*, 198 Ill. 28; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496. But see *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150.

¹⁹ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137.

question is whether it is designed for purposes of trade or not. A tenant may erect a large, as well as a small, messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose." This presents the extreme view of the American cases on the question of injury by removal. As a rule, it is too broad, and, in many cases, it is not strictly correct, for chattels that are attached for trade purposes, and so annexed to the realty as to be an integral part of the premises, or articles that have been substituted for other articles that were a part of the realty, do not thereby become trade fixtures, subject to removal, but they are a part of the freehold.²⁰

The effect of the modern decisions, however, in respect to

²⁰ In *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791, a tenant removed the pillars, partitions, sewers, and floors in a building occupied by him, and replaced them by others, more expensive and better suited to his business, and it was held that the substituted materials were not trade fixtures.

So, in *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159, a steam heating plant, consisting of a steam boiler set in and on a cement and brick foundation, and encased in brick masonry, which was substituted for a prior plant, was held to be a part of the realty.

In *Hay v. Tillyer* (N. J. Eq.) 14 Atl. 18, where glass furnaces in a manufactory were worn out by the tenants, and they substituted and built new ones in their places, such new furnaces were not trade fixtures, but a part of the realty.

But see *Beers v. St. John*, 16 Conn. 322, where a shop was substituted for an old one, the material and construction being different, so as, in reality, to furnish a building distinct from the old one, and not a reconstruction, it was held that the same was not a part of the freehold.

In *Camp v. Chas. Thacher Co.*, 75 Conn. 165, where new plumbing was put into a hotel by the lessee, replacing old plumbing of a different kind, it was held that the same was a part of the realty.

the question of injury by removal, seems to grant to the tenant the right to remove those trade fixtures whose removal will not materially injure the premises, or put them in a worse condition than they were in when he took possession.²¹

— (a) What constitutes a trade.

The term "trade," as used in connection with trade fixtures, has a much broader signification than the literal and customary use of the word; for, within the term of "trade fixtures" are included not only occupations ordinarily designated as "trade," but numerous other occupations, having a resemblance or affinity to a trade, though scarcely to be included within the ordinary definition of that term. In fact, it seems that the term, in this connection, covers any calling exercised for the purpose of pecuniary profit, provided that it is not exclusively agricultural in its nature, and it matters not whether the article attached or annexed to the freehold is used solely for a trade purpose or not,—it is sufficient if it is used partly for a trade purpose, thus constituting a mixed case.²² In this sense of the term, as

²¹ *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; *Lanphere v. Lowe*, 3 Neb. 131; *Whiting v. Brastow*, 4 Pick. (Mass.) 311; *Moore v. Smith*, 24 Ill. 513; *Baker v. McClurg*, 198 Ill. 28; *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46, 5 L. R. A. 150, 14 Am. St. Rep. 460.

²² In *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, where a building was erected by the tenant for the purpose of carrying on the business of a dairyman, and where, at the same time, the tenant used the building as a residence, the court said: "Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on (184)

aforementioned, an innkeeper or hotel proprietor exercises a trade;²³ likewise a livery stable keeper;²⁴ so, a lumber company manufacturer;²⁵ likewise a railroad company;²⁶

his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception."

So, in *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238, a cider mill erected by a tenant for the purpose of making cider on the farm was held to be removable, it being a mixed case, involving, in part, the exercise of a trade.

²³ A ballroom erected by a tenant on the leased premises for use by him in connection with his hotel or restaurant is a trade fixture. *Ombony v. Jones*, 19 N. Y. 234. Likewise, a barn placed by an innkeeper on an adjoining lot is removable. *Dubois v. Kelly*, 10 Barb. (N. Y.) 496. So, an office counter and iron safe in a hotel and restaurant. *Cubins v. Ayres*, 72 Tenn. (4 Lea) 329. So, an oyster counter in restaurant. *Guthrie v. Jones*, 108 Mass. 191. Likewise, a cistern, gas and water pipes in a boarding house. *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64.

²⁴ A building erected by a tenant on a vacant lot for the purposes of a livery stable is a trade fixture. *Firth v. Rowe*, 53 N. J. Eq. 520.

²⁵ A gang edger in a saw mill is a trade fixture. *Stokoe v. Upton*, 40 Mich. 581, 29 Am. Rep. 560. So, a building placed by a lumber company on leased premises, for use as a lumber office for its employes, is a trade fixture. *Security Loan & Trust Co. v. Willamette Steam Mills, L. & M. Co.*, 99 Cal. 636. See, also, *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510.

²⁶ A depot erected by a railroad is a trade fixture. *Carr v. Georgia R. Co.*, 74 Ga. 74.

so, a saloon proprietor;²⁷ so, a proprietor of a laundry;²⁸ so, a store keeper;²⁹ and so a nursery man, planting and growing trees and shrubs, has been held to carry on a trade.³⁰

— (b) What are trade fixtures.

To constitute any chattel that has been attached to the freehold a trade fixture, it is only necessary that it be devoted to what is known in the law of fixtures as a trade purpose, and, as the majority of the courts require, be removable without material injury to the premises, or to the essential characteristics of itself as a chattel.³¹

The form or size of the annexed chattel is immaterial. Large buildings, such as stores, barns, and ice houses, and heavy machinery, such as engines, boilers, and all kinds of manufacturing machinery, have been held trade fixtures.³²

²⁷ A building placed on a beach by the lessee on leased premises for saloon purposes, and resting on sills supported on blocks buried in the sand, is a trade fixture. *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341. So, bar counters. *Asheville Woodworking Co. v. Southwick*, 119 N. C. 611; *Berger v. Hoerner*, 36 Ill. App. 360.

²⁸ A steam heating plant placed in a building by the lessee for the purposes of a laundry, and for heating purposes, is a trade fixture. *President, etc., of Insurance Co. of North America v. Buckstaff* (Neb; 1902) 92 N. W. 755.

²⁹ A counting room placed in a store by a tenant is a trade fixture. *Brown v. Wallis*, 115 Mass. 156. So, platform scales set in the ground. *Bliss v. Whitney*, 9 Allen (Mass.) 114, 85 Am. Dec. 745; *Allen v. Kennedy*, 40 Ind. 142. Likewise an awning built of wood in front of a store. *Devin v. Dougherty*, 27 How. Pr. (N. Y.) 455.

³⁰ A greenhouse erected by a nurseryman for the purposes of his business is a trade fixture. *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991. So, plants and trees grown by the nurseryman for the purposes of his trade. *Miller v. Baker*, 1 Metc. (Mass.) 27; *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *King v. Wilcomb*, 7 Barb. (N. Y.) 263.

³¹ See ante, this chapter, § 33, "Trade Fixtures," notes 15-17.

So, articles which, most apparently, are a part of the realty, such as plants and trees grown by a nurseryman, have been

³² The following articles annexed have been held to be trade fixtures, and removable: An awning and shed (*Devin v. Dougherty*, 27 How. Pr. [N. Y.] 455); a bark mill (*Heermance v. Vernoy*, 6 Johns. [N. Y.] 5); bar, counter, and shelf (*Berger v. Hoerner*, 36 Ill. App. 360); belting (*Moore v. Wood*, 12 Abb. Pr. [N. Y.] 393; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Hey v. Bruner*, 61 Pa. 87); boilers (*Kelsey v. Durkee*, 33 Barb. [N. Y.] 410; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Davis v. Moss*, 38 Pa. 346; *Hey v. Bruner*, 61 Pa. 87; *Moore v. Wood*, 12 Abb. Pr. [N. Y.] 393; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145); boiler placed by tenant upon a foundation of brick and cement (*Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33); boiler and engine placed upon brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches (*Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817); bowling alley (*Hanrahan v. O'Reilly*, 102 Mass. 201); brewing vessels (*Kelsey v. Durkee*, 33 Barb. [N. Y.] 410); building placed upon a vacant lot for the purpose of a livery stable (*Firth v. Rowe*, 53 N. J. Eq. 520); building erected by a railroad company for a depot (*Carr v. Georgia R. Co.*, 74 Ga. 74); building annexed for a ballroom (*Ombony v. Jones*, 21 Barb. 520, 19 N. Y. 234); building used as a warehouse (*Austin v. Hudson River R. Co.*, 25 N. Y. 334); building erected as a covering for machinery (*Smith v. Whitney*, 147 Mass. 479; *Brown v. Reno Electric Light & Power Co.*, 55 Fed. 229); building erected by a lumber company for use as a lumber office (*Security Loan & Trust Co. v. Willamette Steam Mills, L. & M. Co.*, 99 Cal. 636; *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510); but not a building, substantially erected, and used for an office in connection with other purposes (*Burkhardt v. Hopple*, 6 Ohio Dec. 127); building placed on a beach upon sills supported by blocks buried in the sand, and used for the purpose of a saloon (*Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341); building erected by tenants for miners to live in, standing on posts or walls of dry stone, piled together, and intended to be merely accessory to mining operations, and not to the soil (*Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 52 Am. Rep. 817); building (large wooden) used for an ice house (*Antoni v. Belknap*, 102 Mass. 193); building used for a balloon frame (*Cowden v. St. John*, 16 Iowa,

considered trade fixtures.³³ But chattels that are so attached by the tenant to the freehold as to become an integral

590); building erected by railway company for depot purposes (*Carr v. Georgia R. Co.*, 74 Ga. 74); building, twenty feet square, with foundation of mud sills laid upon the surface of the ground (*Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510); building (an engine house built of brick) used as a protection for the engine of the tenant (*Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229); chimney (brick) (*Moore v. Wood*, 12 Abb. Pr. [N. Y.] 393); cider mills (*Holmes v. Tremper*, 20 Johns. [N. Y.] 29); cisterns of a refinery (*Bidder v. Trinidad Petroleum Co.*, 17 Wkly. Rep. 153); coal bin (*Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452); colliery machines (*Lawton v. Lawton*, 3 Atk. 13); corn mill (*Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145); counter (*Guthrie v. Jones*, 108 Mass. 191); counters and shelving in a drug store (*Roth v. Collins*, 109 Iowa. 501, 80 N. W. 543); distillery fixtures (*Reynolds v. Shuler*, 5 Cow. [N. Y.] 323; *Moore v. Smith*, 24 Ill. 512; *Smith v. Moore*, 26 Ill. 392; *Terry v. Robins*, 5 Smedes & M. [Miss.] 291); electric plant, with dynamos and boiler built upon stone foundations (*Brown v. Reno Electric Light & Power Co.*, 55 Fed. 229); engines (*Cook v. Champ-lain Transp. Co.*, 1 Denio [N. Y.] 91; *Kelsey v. Durkee*, 33 Barb. [N. Y.] 410; *Lemar v. Miles*, 4 Watts [Pa.] 330; *Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, 1 Amb. 113; *Moore v. Wood*, 12 Abb. Pr. [N. Y.] 393; *Merritt v. Judd*, 14 Cal. 59; *Lacey v. Giboney*, 36 Mo. 320; *Hey v. Bruner*, 61 Pa. 87; *Davis v. Moss*, 38 Pa. 346); furnaces (*Kelsey v. Durkee*, 33 Barb. [N. Y.] 410); gas fixtures (*Lawrence v. Kemp*, 1 Duer [N. Y.] 363; *Guthrie v. Jones*, 108 Mass. 191; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471); greenhouse used in gardening and florist work (*Free v. Stuart*, 39 Neb. 220, 57 N. W. 991); heating plant in laundry (steam)

³³ A nurseryman may remove such trees, shrubs, and plants as are salable as such in his trade of nurseryman, on the ground that he is carrying on a species of trade (*King v. Wilcomb*, 7 Barb. [N. Y.] 263; *Maples v. Millon*, 31 Conn. 598; *Brooks v. Galster*, 51 Barb. [N. Y.] 196; *Fox v. Brissac*, 15 Cal. 223); but not trees cultivated and used by a tenant, a market gardener, for the fruit they yield (*Wardell v. Usher*, 3 Scott [N. R.] 508).

part thereof, and chattels that are so substituted by the tenant for other articles that are inferior or worn out, are not trade fixtures.³⁴

The main and important test in determining a trade fixture is the purpose to which it is devoted. The degree and

(President, etc., of Insurance Co. of North America v. Buckstaff [Neb.; 1902] 92 N. W. 755); hydraulic press (Finney v. Watkins, 13 Mo. 291); iron rails in a mine (Heffner v. Lewis, 73 Pa. 302); machinery worth \$10,000 placed in a sugar mill by a tenant (Cook v. Folsom, 2 Lanc. Law Rev. 185); machinery in woolen mill (Walker v. Sherman, 20 Wend. [N. Y.] 636); machinery in cotton mill (Buckley v. Buckley, 11 Barb. [N. Y.] 43); mill stones (Moore v. Smith, 24 Ill. 512); ovens placed in a leased building by a tenant for carrying on the bakery business (Baker v. McClurg, 198 Ill. 28, 59 L. R. A. 131); oyster and lunch counter (Guthrie v. Jones, 108 Mass. 191); partitions and box stalls in a saloon (Dingley v. Bufum, 57 Me. 381); platform scales (Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; Allen v. Kennedy, 40 Ind. 142; Bliss v. Whitney, 9 Allen [Mass.] 114, 85 Am. Dec. 745); railroad rails (Mott v. Palmer, 1 N. Y. 564; Ford v. Cobb, 20 N. Y. 344); railroad iron, spikes, bolts, etc. (Northern Central Ry. Co. v. Canton Company of Baltimore, 30 Md. 347); salt pans (Lawton v. Salmon, 1 H. Bl. 259, note; Kelsey v. Durkee, 33 Barb. [N. Y.] 410; Reynolds v. Shuler, 5 Cow. [N. Y.] 323; Mansfield v. Blackburne, 6 Bing. N. C. 426); shafting (Moore v. Wood, 12 Abb. Pr. [N. Y.] 393; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Hey v. Bruner, 61 Pa. 87); sheds (Devin v. Dougherty, 27 How. Pr. [N. Y.] 455); snelles in a store (Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452); shrubs planted for sale (Penton v. Robart, 2 East, 88; Miller v. Baker, 1 Metc. [Mass.] 27); stationary saw mill (Kile v. Giebner, 114 Pa. 381, 7 Atl. 154); stills (Reynolds v. Shuler, 5 Cow. [N. Y.] 323; Raymond v. White, 7 Cow. [N. Y.] 319; Burk v. Baxter, 3 Mo. 207; Heermance v. Vernoy, 6 Johns. [N. Y.] 5); trees planted for sale (Penton v. Robart, 2 East, 88; Miller v. Baker, 1 Metc. [Mass.] 27; King v. Wilcomb, 7 Barb. [N. Y.] 263).

³⁴ See ante, note 20.

mode of annexation of the article is apparently not material except so far as it determines the injury resulting to the premises, or, possibly, to the article itself, by its removal from the realty.

The intention of the party making the annexation—a test that is ordinarily, in the law of fixtures, of prime importance, and the ultimate consideration in determining the removability of an annexed chattel—would seem to be immaterial in those states where a trade fixture is regarded as a part of the realty until severed, for the reason that the right of removal exists independently of the fact that the article is a part of the realty. But the cases, even in those states where a trade fixture is regarded as a part of the realty, do not so treat the question of intention; for, if the intention of the tenant making the annexation clearly appears to make the articles annexed a permanent accession to the freehold, his right to remove them as trade fixtures apparently has been waived, and his expressed intention will control.³⁵ But, in the absence of an expressed intention, the legal presumption is that the tenant who erects fixtures upon his lessor's land for purposes of trade intends to remove them before the expiration of his term, and only upon his leaving the prem-

³⁵ In *Linahan v. Barr*, 41 Conn. 471, where a tenant erected a brick building on foundation walls, upon which a leased building had been previously destroyed by fire, it was held that his declarations to the effect that he knew his erection would belong to the landlord, and that he did not intend to remove the same at the expiration of his tenancy, were admissible as showing his intention. See, also, *Wall v. Hinds*, 4 Gray (Mass.) 271, 64 Am. Dec. 64; *Morey v. Hoyt*, 62 Conn. 553; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Carver v. Gough*, 153 Pa. 225.

ises without removing his trade fixtures is the intention of making them a gift to his landlord imputed to him.³⁶

§ 34. Domestic fixtures.

The term "domestic fixtures" is applied to those articles of domestic convenience which are annexed to the premises by the tenant for the more advantageous use of the premises, and such fixtures are removable by the tenant, provided that no material injury thereby results to the realty, or to the substantial characteristics of the articles themselves.^{36a} This rule, or, rather, exception to the old common-law rule in favor of the landlord, developed later, as noted in chapter two, as a further indulgence allowed the tenant beyond the exception stated in favor of "trade fixtures." The grounds of this rule are based on the fact that these fixtures are erected only for temporary purposes, and as a matter of convenience, while the tenant occupies the premises, and are not intended to become a part of the realty, and that it would be extremely harsh and disadvantageous to tenants to require that all articles annexed by the tenant for his better domestic convenience should immediately become the property of the landlord.³⁷

³⁶ In *Hill v. Sewald*, 53 Pa. 271, the court said that "the same want of intention to convert is imputed to a tenant who attaches to the land fixtures for the use of his business, the law presuming, in favor of trade, that he meant to remove them before the end of his term; and it is only on leaving without removal that the intention to make a gift of them to the landlord is imputed to him."

^{36a} *Hayford v. Wentworth*, 97 Me. 347.

³⁷ "The reason of the relaxation of the rule is found in the public policy and convenience which permit the tenant to make the most profitable and comfortable use of the premises demised that can be obtained consistently with the rights of the owner of the free-

It will be noted that the reason for the rule is different than that asserted for "trade fixtures." Under the head of "domestic fixtures," the early cases included mostly annexed chattels that were purely personalty in their nature, such as were useful and convenient for domestic purposes in and about a house, and often the personal nature of these articles was the principal ground upon which they were protected as removable. Most of the articles falling within this class of fixtures are utensils and machines, perfect chattels in themselves, and serving as substitutes for mere movable furniture.³⁸ Thus, ranges and stoves fixed in brickwork, fixed beds and tables, furnaces, gas fixtures, pumps, clocks, window blinds, bath tubs, water closets, and other chattels annexed for convenience, have been considered "domestic fixtures."³⁹

hold." *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192. See *Tyler, Fixtures*, p. 385; *Ewell, Fixtures*, p. 127.

³⁸ *Amos & Ferard, Fixtures*, § 84.

³⁹ See *Tyler, Fixtures*, p. 366 et seq., and *Ewell, Fixtures*, p. 137, as to the English cases holding that stoves, ranges, ovens, boilers, chimney pieces, pier glasses, and furnaces, together with other household articles, are removable.

A fire frame fixed in a common fireplace, with bricks on the sides, laid in between the sides of the fire frames and the jambs of the fire places, are domestic fixtures. *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192, 28 Am. Dec. 290. So, a "wash-down siphon water closet" and its appurtenances, placed in a business office, in the customary way, and connected with the soil pipe, by a tenant at will for his own use, is removable by the tenant. *Hayford v. Wentworth*, 97 Me. 347. So, a porcelain bath tub, standing on four legs, connected with soil pipes and a hot-water heater, in a dwelling house. *Philadelphia Mortg. & Trust Co. v. Miller*, 20 Wash. 607, 44 L. R. A. 559, 72 Am. St. Rep. 138.

The following have been held removable as "domestic fixtures": Cisterns and sinks (*Wall v. Hinds*, 4 Gray [Mass.] 256, 64 Am. Dec. 64); gas fixtures,—just as, in the early history of the law, cande- (192)

But, apparently, the cases have never extended the doctrine as to "domestic fixtures" so as to include large articles, such as a house built by a tenant for habitation, a barn, or other building; for such an article, being of a substantial

labra, chandeliers, and other apparatus for lighting purposes were removable by the tenant as fixtures erected by the tenant for domestic convenience, so, gas fixtures have universally been held to be removable, on the ground that they are merely substitutes for the lamps, candlesticks, and chandeliers formerly used to hold candles. In *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, the court said that this doctrine was rather doubtful in principle, but was too well established as the law of the country generally to be overturned, and that the rule must be regarded as rather an arbitrary exception to the general rule. In this case, two hundred and sixty-eight gas fixtures, consisting of gas chandeliers and burners, screwed onto the ends of gas pipes projecting from the walls, were held removable, while one hundred and eighty-four steam radiators, attached to the steam pipes at the floors on which they rested, by being screwed to those pipes, and an electric annunciator attached to the wall and to the wires of the electric bell system, were held to be a part of the realty. These fixtures that are removable include, generally, the chandeliers and burners, although the rule has been extended to gas stoves (*Vaughen v. Haldeman*, 33 Pa. 522), to a gasometer, and an apparatus for generating gas (*Hays v. Doane*, 11 N. J. Eq. 84), but not to gas pipes (*Gas Company v. Hunter*, 2 R. I. 157); but where gas pipe was passed through the floors and partitions, and held to the walls by metal bands, and was removable without injury to the building, it was held removable (*Wall v. Hinds*, 4 Gray [Mass.] 256). See *Lawrence v. Kemp*, 1 Duer (N. Y.) 363; *Beardsley v. Sherman*, 1 Daly (N. Y.) 325; *Freeland v. Southworth*, 24 Wend. (N. Y.) 191; *Shaw v. Lenke*, 1 Daly (N. Y.) 487; *Funk v. Brigaldi*, 4 Daly (N. Y.) 359; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Guthrie v. Jones*, 108 Mass. 191 (gas pipes); *Towne v. Fiske*, 127 Mass. 125 (portable iron furnace); *Rogers v. Crow*, 40 Mo. 91; *Montague v. Dent*, 10 Rich. Law (S. C.) 135; *Jarechi v. Philharmonic Soc.*, 79 Pa. 403; *McCracken v. Hall*, 7 Ind. 30 (pump); *Bank v. North*, 160 Pa. 303, 28 Atl. 694 (steam radiators). Contra, *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257.

size, and not temporarily constructed, is deemed to have been annexed *perpetui usus causa*, and is not removable, although, if the same had been erected for the purposes of a trade, the contrary rule would obtain.⁴⁰ In determining what fixtures are removable under this rule, nearly the same principles of law are applicable as in the case of "trade fixtures," although the law is much more strictly applied to this class of fixtures than to "trade fixtures."

The usual tests applicable to fixtures—the nature of the article annexed, its mode and degree of annexation, the purpose to which it is put, and its adaptability to that purpose, together with the intention of the party making the annexation—are all co-ordinately and effectively applied in determining the removability of the article as a "domestic fixture."

§ 35. Ornamental fixtures.

The same principles and rules apply to articles annexed for ornamental purposes as to "domestic fixtures," and the same reason for the extension of the exception in the common-law rule in favor of the tenant exists. Such articles, when devoted to purposes of mere ornament by the tenant, and when severable without material injury to the freehold or to themselves, are removable. There are not many modern decisions on this particular topic, for the reason, perhaps, that the great majority of modern ornamental articles are of a chattel nature. The following articles have been considered ornamental fixtures: Hangings, tapestry, and pier

⁴⁰ Ewell, *Fixtures*, p. 133; *Buckland v. Butterfield*, 2 Brod. & B. 54; *Jenkins v. Gething*, 2 Johns. & H. 520; *Ombony v. Jones*, 19 N. Y. 234.

glasses nailed to the walls or panels of a house, marble chimney pieces, cornices, etc.⁴¹

§ 36. Agricultural fixtures.

Fixtures erected by a tenant for agricultural purposes, and for the better enjoyment of the immediate profits of the land, were early held, in the leading case of *Elwes v. Maw*,⁴²

⁴¹ In *Buckland v. Butterfield*, 2 Brod. & B. 54, a conservatory constructed with sliding glasses, and paved with Portland stone, was attached to a house by cantilevers let nine inches into the wall. The removal of this conservatory exposed the side of the house to which it had been attached. The question arose as to whether this article of ornament was removable. The court said: "On the one hand it is clear that many things of an ornamental nature may be, in a degree, affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is that, where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time, this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favor of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed that they are exceptions only, and therefore, though to be fairly considered, not to be extended." See, also, *D'Eyncourt v. Gregory*, 15 Wkly. Rep. 186, where pieces of statuary were considered, not mere articles of ornament, but as belonging to the architectural design of the house.

In *re De Falbe* (1901) 70 Law J. Ch. 286, 1 Ch. 523, 84 Law T. 273, 49 Wkly. Rep. 455.

⁴² *Elwes v. Maw*, 3 East, 38. In this case, a tenant for years erected upon a farm, consisting of a messuage, barns, stable, out-houses, and other buildings, a beast house, a carpenter shop, a fuel house, a cart house, a pump house, and fold yard. These buildings of the tenant were of brick and mortar, and tiled, and the foundations of them about a foot and a half deep in the ground. The question arose as to the right of the tenant to remove them. Lord Ellenborough delivered the opinion of the court, and said: "This

to be irremovable by the tenant, and the doctrine laid down in that case has been followed, mainly, in the United States decisions, although there have been numerous opinions, by way of *obiter dicta* and otherwise, criticising the doctrine enunciated in that case, and apparently extending the right of removal to and including this class of fixtures,⁴³ but it

was an action on the case in the nature of waste by a landlord, the reversioner in fee, against his late tenant. * * * The general rule on the subject of fixtures is that which is laid down in the Year Book, * * * to the following effect, namely: that when a lessee, having annexed anything to the freehold during his term, takes it away, it is waste; but upon this rule certain exceptions have at various times been attempted to be engrafted in favor of trade. The principal one of such exceptions is the tenant's right to remove those utensils which he may set up in relation to his trade; * * * but no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself, who built them during his term. * * * But the case of buildings for trade has been always put and recognized as a known, allowed exception from the general rule which obtains as to other buildings, and the circumstance of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favor of tenants in the latitude contended for by the defendant, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlord and tenants; but its danger or probable mischief is not so popularly a consideration for a court of law as whether the adoption of such a doctrine would be an innovation at all, and, being of opinion that it would be so, and contrary to the uniform current of legal authorities upon the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

⁴³ In *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, the court said, in ref-
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may be noted that in nearly all of the cases where the rule stated is attacked, the removability of the fixture at issue is decided upon the fact that it comes within the recognized ex-

erence to the case of *Elwes v. Maw*: "The court there decided that, in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. * * * It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law."

In *Dubois v. Kelly*, 10 Barb. (N. Y.) 496, the court said: "This distinction [between trade and agricultural fixtures], although it may not have been, in any single instance, broken down by any adjudged case, has not, I am persuaded, been regarded with much favor in this country, if, indeed, it has in England. The foundation upon which it rests is narrow and artificial. The general policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed without the consent of the owner of the inheritance, applies as well to erections for agricultural and other purposes as to erections for the purposes of trade." But see *Ombony v. Jones*, 19 N. Y. 234.

In *Harkness v. Sears & Walker*, 26 Ala. 493, 62 Am. Dec. 742, the court said: "The interest of the owner of the soil, as well as public policy, in America, required that erections for agricultural purposes, put upon the land by a tenant, should receive the same protection in favor of the tenant that was extended by the common law of England to fixtures made for the purposes of trade." This, however, is a mere dictum, for in this case a cog wheel let into the ground, and connected with a turning lathe, was held to be a part of

ception in favor of trade, domestic, or ornamental fixtures.⁴⁴ Thus, in *Van Ness v. Pacard*, a house erected and occupied the realty, as between vendor and vendee. See, also, *Davis' Adm'r v. Eastham*, 81 Ky. 116.

In *Wing v. Gray*, 36 Vt. 261, where hop poles were held removable by a tenant, the court alluded to the criticisms made in this country to the principle laid down by *Elwes v. Maw*, 3 East, 38, in respect to erections for agricultural purposes.

In *McMath v. Levy*, 74 Miss. 450, the court said: "The simple question presented by this appeal is, may a purchaser from a tenant who bought and put upon leased premises—a plantation—a gin, condenser, etc., with the intention of removing them at pleasure, remove and hold them against the landlord? The question is easily answered. Against the general doctrine of fixtures made by one upon the premises of another, there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. The placing of gins, condensers, etc., on plantations cultivated largely in our staple product, cotton, are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against their landlords, are not to be doubted." See, also, *Carver v. Gough*, 153 Pa. 225.

In *Perkins v. Swank*, 43 Miss. 349, where an engine and other

⁴⁴ In *Dubois v. Kelly*, 10 Barb. (N. Y.) 496, the building was held removable on the ground that the landlord had, by express agreement, given the privilege to the tenant, or that it might be regarded as an erection for purposes of trade. See *Whiting v. Brastow*, 4 Pick. (Mass.) 310. See, also, *McMath v. Levy*, 74 Miss. 450, where it was held that a cotton gin could be removed by one purchasing it from a tenant. The court here stated: "Against the general doctrine of fixtures made by one upon the premises of another, there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. The placing of gins, condensers, etc., on plantations cultivated largely in our staple product,—cotton,—are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against their landlords, are not to be doubted." See *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Wing v. Gray*, 36 Vt. 261.

by a tenant with his family was removable for the reason that it came within the exception in favor of trade.⁴⁵ So,

saw-mill machinery were held to be a part of the realty as between the parties standing in the relationship of vendor and vendee, the court said: "The English courts seem to have made no relaxation in favor of erections for agricultural uses; but it is otherwise in the United States." The court cites in support of the statement *Van Ness v. Pacard*, 2 Pet. (U. S.) 147, where the tenant was allowed to remove the fixture in question on the ground that it was a "mixed case."

By St. 14 and 15 Vict. c. 25, § 3, it is provided that if any tenant of a farm or land shall, after the passing of that act, with the consent in writing of the landlord, for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, etc., shall be the property of such tenant, and removable by him, notwithstanding the same may consist of separate buildings, or the same or any part thereof may be built in or permanently affixed to the soil; so as the tenant making any such removal do not in any wise injure the land or buildings belonging to the landlord, or otherwise do put the same in like or as good plight and condition as the same were in before the erection of the things so removed. Before removal, however, every tenant must give to the landlord, or his agent, a month's notice in writing of his intention, and the landlord may thereupon elect to purchase the things so proposed to be removed, whereupon the right to remove shall cease. The value is to be ascertained by two referees (one chosen by each party) or their umpire, and is to be paid or allowed in account by the landlord. See, also, to a similar effect, 38 and 39 Vict. c. 92.

See, also, *Davis' Adm'r v. Eastham*, 81 Ky. 116.

Dicta extending the rights of removal: "Whatever erections he [the tenant] made while in possession of the premises for the more beneficial enjoyment of the same he had a right to remove before

⁴⁵ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137.

in *Holmes v. Tremper*, a cider mill and press were held removable as coming under the head of a mixed case, being partly devoted to the enjoyment of the land, and partly to the exercise of a trade.⁴⁶ In this connection there is no distinct rule in regard to agricultural fixtures apart from the law of fixtures generally, but rather the exception granted to tenants in favor of their trade, domestic, or ornamental fixtures has never been extended so as to include articles attached by the tenant for mere agricultural purposes. As stated in a Pennsylvania case,⁴⁷ there are strong reasons why

the expiration of the term, provided they could be severed without material injury to the freehold. As between landlord and tenant, the rule in regard to the removal of fixtures is most liberally construed in favor of the latter. As the landlord pays nothing for the improvements put up by the tenant, policy and justice demand that the tenant should be allowed to remove the additions or improvements unless the removal would operate to the prejudice of the inheritance by leaving it in a worse condition than when he took possession." *Bircher v. Parker*, 40 Mo. 118. Also *Lacey v. Giboney*, 36 Mo. 320. See *Ross v. Campbell*, 9 Colo. App. 38; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509.

⁴⁶ *Holmes v. Tremper*, 20 Johns. (N. Y.) 29.

⁴⁷ In the case of *McCullough v. Irvine's Ex'rs*, 13 Pa. 440, the court said: "The exceptions have been carried very far by some decisions in the Eastern states, particularly in *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, and also in *Van Ness v. Pacard*, 2 Pet. (U. S.) 137. It is, however, in somewhat loose expressions of the court in those cases, and not from the cases themselves, that the principle asserted by the court below derives some countenance. The first, where the dicta is the most latitudinarian, was merely the removal of a padlock and some loose boards, about which there never could have been any reasonable doubt. The second was the removal of a cider press by the tenant; and there no reasonable doubt of its being an implement for the manufacture of cider would be entertained. The last case

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these exceptions granted to the tenant should not be extended to agricultural fixtures, on the ground that the best interests of agriculture would be greatly retarded; furthermore, such an exception would serve to obliterate entirely the law of fixtures as far as the landlord and tenant are concerned. The liberality with which the courts have construed the term "trade" as applied to fixtures, and the general principles and tests used in determining a fixture, has prevented any great injustice from arising to agricultural tenants. As the general rule of the law of fixtures applies to

runs to a little more magnitude, for it was removing a sort of a house, but a house erected for the purpose of manufacturing a commodity, * * * and the decision goes expressly on the ground of its not being a dwelling house. But none of these cases, either expressly or by implication, overrule or impeach the case of *Elwes v. Maw*, 3 East, 38, in which it was held that an agricultural tenant could not remove, during the continuance of his lease, a beast house, carpenter shop, and fuel house, etc., erected for the use of the farm, even though he left the premises as he found them. In that case the whole law on that subject was ably reviewed; and although it is an English case, I believe it to be the law of Pennsylvania, and for the very same reason that the court below give for a contrary opinion. In my judgment, that is a rule which tends to promote the interests of agriculture, whilst its converse would tend to retard and impede its progress. We must have many tenancies for life in Pennsylvania by will, by deed, and by descent; and if the tenant, after having enjoyed the fruits of the land during perhaps a long life, may, just before his death, strip it of the fences he has built, and the house and barn he has erected, because the advance in the improvement and commerce of the country would leave the land of as much intrinsic value as when he took possession, and convert it into a solitary waste for the winds to moan over, the tenant of a new generation will have to take the land as it was a generation before, and commence improvements de novo. This, I apprehend, would be a slovenly mode of promoting the interests of agriculture."

agricultural fixtures, it is needless to advert to specific instances of such fixtures.

— (a) **Manure.**

However, under this head, the question as to when manure made on the demised premises belongs to the landlord, and when to the tenant, is particularly noteworthy. Manure made on the farm, and from the produce of the farm, is generally considered a part of the realty;⁴⁸ but manure not made

⁴⁸ Manure made under a farming lease in the usual course of husbandry is a part of the realty, and irremovable by the tenant. *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Perry v. Carr*, 44 N. H. 118; *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; *Plumer v. Plumer*, 30 N. H. 558; *Lewis v. Lyman*, 22 Pick. (Mass.) 442; *Lewis v. Jones*, 17 Pa. 262. Contra, *Smithwick v. Ellison*, 2 Ired. (24 N. C.) 326, 38 Am. Dec. 697. Likewise as to manure made upon a dairy farm under a lease. *Lewis v. Lyman*, 22 Pick. (Mass.) 437; *Waln v. Connor*, 5 Clark (Pa.) 164. It is immaterial that such manure is lying about in heaps about the barn or yard. *Lassell v. Reed*, 6 Me. 222; *Sawyer v. Twiss*, 26 N. H. 345. Or that it is made from the hay of the tenant raised upon the demised premises. *Wetherbee v. Ellison*, 19 Vt. 379. Manure made from some hay and some grain, brought upon the premises from without, does not entitle it to be removed by the tenant if it be commingled with manure made from the produce of the land. *Lewis v. Jones*, 17 Pa. 262, 55 Am. Dec. 550; *Lassell v. Reed*, 6 Me. 222. But manure not made in the usual course of husbandry, and in connection with some trade, is removable by the tenant. So held in *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611, where the land was used for a corral for herding large numbers of cattle brought there to be slaughtered for use in the armies of the United States, and the cattle were fed with fodder from abroad. Likewise in *Carroll v. Newton*, 17 How. Pr. (N. Y.) 189, where a tenant of a house, barn, grocery, and garden used the barn for keeping eighteen or twenty head of horses, and fed them with provender brought from without. Manure made upon premises in connection with a livery stable is removable. *Daniels v. Pond*, 21 Pick.

in the course of husbandry, or from produce obtained elsewhere, or upon demised premises that are not agricultural, or made in connection with some trade, as in a livery stable, is removable by the tenant.⁴⁹

—— (b) **Straw.**

So, straw, being a part of the crop, is removable by the tenant.⁵⁰

§ 37. **Mixed cases.**

Where chattels are annexed to the freehold by the tenant partly for purposes of trade, and partly to enjoy the profits of the land, or for domestic convenience, there is constituted a "mixed case," as it is generally termed. In such cases, the same principles of law are applicable as to trade fixtures, if it is clearly discernible that the annexed article is in some manner used for carrying on a species of trade. This prin-

(Mass.) 367, 32 Am. Dec. 269. Manure made by the cattle of a tenant from hay brought from the tenant's own farm is removable. *Corey v. Bishop*, 48 N. H. 146. Manure made in the business of raising hogs, which are not fed upon the products of the land, is removable. *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333. See, also, *Elting v. Palen*, 60 Hun, 306, 14 N. Y. Supp. 607; *Bonnell v. Allen*, 53 Ind. 130.

⁴⁹ See ante, note 48.

Manure produced on the leased premises by stock fed on fodder produced elsewhere, in excess of that maintainable by the products of the premises, is removable. *Pickering v. Moore*, 67 N. H. 533, 31 L. R. A. 698.

⁵⁰ Straw, being part of the crop, and there being no general usage requiring that it revert to the land, is removable by the tenant. *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568; *Fletcher v. Herring*, 112 Mass. 382; *French v. Freeman*, 43 Vt. 93; *Bonnell v. Allen*, 53 Ind. 130.

ciple was early recognized in the English cases, first, in respect to steam engines and machinery used in collieries, where it was evident that the annexed articles were used both for the enjoyment of the estate and for carrying on a species of trade, and then to a cider press and mill.⁵¹ So, the principle has been extended to machines and erections placed by a tenant upon the realty for the purpose of procuring or preparing minerals, lime, alum, pottery, and manufacturing bricks.⁵² So, it extends to hothouses, greenhouses, trees, shrubs, etc., placed by a nurseryman or gardener on or in the realty.⁵³ It includes buildings erected by the tenant on the demised premises, and used partly for trade purposes, and partly for domestic purposes. In *Van Ness v. Pacard*,⁵⁴ a tenant for years, a carpenter by trade, erected a

⁵¹ See *Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, Amb. 113; *Elwes v. Maw*, 3 East, 38.

In *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, a cider mill and press, erected by a tenant holding from year to year, at his own expense, and for his own use, was removable by a tenant as being an accessory to the trade of making cider.

⁵² In *Merritt v. Judd*, 14 Cal. 560, a steam engine and pump, used for the purpose of working a quartz ledge in the getting out of gold, the engine and pump being fastened in and to the ground, were held removable.

So in *Beckwith v. Boyce*, 9 Mo. 556, sheds erected by the tenant upon posts set in the ground for the purpose of manufacturing brick were removable.

See *Tyler, Fixtures*, pp. 321-327; *Amos & Ferard, Fixtures*, p. 60.

⁵³ *Miller v. Baker*, 1 Metc. (Mass.) 27; *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Brooks v. Galster*, 51 Barb. (N. Y.) 196; *Maples v. Milton*, 31 Conn. 598; *Fox v. Brissac*, 15 Cal. 223.

⁵⁴ In *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, Justice Story said: "It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family
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building for the purpose of carrying on the business of a dairyman and of a carpenter, and for a place of residence for

residence. But the question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large, as well as a small, messuage, or a soap boilery of one or two stories high, and on whatever foundation he may choose. * * * Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was 'that the defendant erected the building before mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business.' The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operation of this trade. Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants was or might be of very great utility and importance. The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and, unless we were prepared to say (which we are not) that the mere fact that the house was used for a dwelling house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most it would be deemed only a mixed case, analogous in principle to those before Lord Chief Baron

his family and servants engaged in the business. The court there stated that the fact that the building was used as a residence, as well as for trade purposes, did not invalidate the exception in favor of tenants as to trade fixtures.

§ 38. Time of removal.

A tenant has the right, at any reasonable time, to remove those articles so attached by him to the premises of his landlord as to be mere personalty;⁵⁵ that is, where the application of the usual tests of fixtures shows that the article in question is removable as personalty. But as to a tenant's fixtures,—his trade, domestic, or ornamental fixtures,—the general rule is that the tenant must remove the same during the continuance of his term,⁵⁶ or before he surrenders the possession of the premises under his lease.⁵⁷ The ground of this

Comyns and Lord Hardwicke, and therefore entitled to the benefit of the exception."

⁵⁵ *Morey v. Hoyt*, 62 Conn. 542; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Guthrie v. Jones*, 108 Mass. 191; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467; *Donnewald v. Turner Real Estate Co.*, 44 Mo. App. 351; *Wansbrough v. Maton*, 4 Adol. & E. 884; *Davis v. Jones*, 2 Barn. & Ald. 165. See *supra*, § 31, "Nature and Application of the Rule."

⁵⁶ This rule is recognized in all the cases, even in the earliest times. Thus, in Year Book 20 Hen. VII. 13b, pl. 24 (1504), it is clearly stated: "And if a lessee for years make such a furnace for his advantage, or a dyer makes his vats and vessels to carry on his occupation during his term, he may remove them; but if he suffer them to remain fixed to the earth after the end of his term, then they belong to the lessor." See cases cited in note 57.

⁵⁷ In *Heap v. Barton*, 12 C. B. 274, decided in 1852, *Jervis, C. J.*, said: "The courts seem to have taken three separate views of the [above] rule: First, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has, during the term, exercised his right to remove them; second, as in *Penton v. Robart*, 2 East, 88, (206)

rule arises upon the presumption of law that the tenant, quitting the leased premises at the expiration of his term,

that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises; third, that his right to remove fixtures after his term has expired is subject to this further qualification, viz.: that the tenant continues to hold the premises under a right still to consider himself as tenant."

England: *Ex parte Quincy*, 1 Atk. 477; *Dudley v. Warde*, 1 Amb. 113; *Minshall v. Lloyd*, 2 Mees. & W. 450; *Pugh v. Arton*, L. R. 8 Eq. 626; *Poole's Case*, 1 Salk. 368; *Lyde v. Russell*, 1 Barn. & Adol. 394; *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Weeton v. Woodcock*, 7 Mees. & W. 14.

Canada: *Harrison v. Smith*, 19 Nova Scotia, 516.

United States: *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939.

California: *Merritt v. Judd*, 14 Cal. 59.

Connecticut: *Beers v. St. John*, 16 Conn. 322.

Illinois: *Smith v. Moore*, 26 Ill. 392; *Donnelly v. Thieben*, 9 Ill. App. 495; *Mason v. Fenn*, 13 Ill. 525.

Indiana: *McCracken v. Hall*, 7 Ind. 30; *Griffin v. Ransdell*, 71 Ind. 440; *Allen v. Kennedy*, 40 Ind. 142.

Iowa: *Dostal v. McCaddon*, 35 Iowa, 318.

Kentucky: *Thomas v. Crout*, 5 Bush, 37.

Maine: *Stockwell v. Marks*, 17 Me. 455; *Davis v. Buffum*, 51 Me. 160; *Dingley v. Buffum*, 57 Me. 381; *Sullivan v. Carberry*, 67 Me. 531.

Maryland: *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467; *Northern Central Ry. Co. v. Canton Company of Baltimore*, 30 Md. 347.

Massachusetts: *Shepard v. Spaulding*, 4 Metc. 416; *Gaffield v. Hapgood*, 17 Pick. 192, 28 Am. Dec. 290; *Bliss v. Whitney*, 9 Allen, 114; *Bainway v. Cobb*, 99 Mass. 457; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694; *McIver v. Estabrook*, 134 Mass. 550.

Michigan: *Stokoe v. Upton*, 40 Mich. 581, 29 Am. Rep. 560.

Minnesota: *Smith v. Park*, 31 Minn. 70, 16 N. W. 490.

Mississippi: *Tate v. Blackburne*, 48 Miss. 1.

Missouri: *Beckwith v. Boyce*, 9 Mo. 560.

and leaving behind him these fixtures, intended to abandon the same, and leave them as a gift in law to the landlord.⁵⁸

Nebraska: *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83; *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6.

New Hampshire: *State v. Elliot*, 11 N. H. 540; *Conner v. Coffin*, 22 N. H. 541.

New Jersey: *Torrey v. Burnett*, 38 N. J. Law, 457, 20 Am. Rep. 421.

New York: *King v. Wilcomb*, 7 Barb. 263; *Reynolds v. Shuler*, 5 Cow. 323; *Loughran v. Ross*, 45 N. Y. 792; *Peck v. Knox*, 1 Sweeny, 311; *Talbott v. Cruger*, 151 N. Y. 120.

Pennsylvania: *Overton v. Williston*, 31 Pa. 155; *Davis v. Moss*, 38 Pa. 346.

Vermont: *Preston v. Briggs*, 16 Vt. 124.

West Virginia: *Childs v. Hurd*, 32 W. Va. 68.

Wisconsin: *Josslyn v. McCabe*, 46 Wis. 591; *Second Nat. Bank of Beloit v. Merrill*, 69 Wis. 501.

Lease terminated by foreclosure: Where a tenant's lease is terminated by the foreclosure of a mortgage on the premises, the tenant has a reasonable time within which to remove his trade fixtures which he has erected thereon. *Bernheimer v. Adams*, 75 N. Y. Supp. 93, 70 App. Div. 114.

Some cases apparently extend the right of removal. In *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, where a cider mill and press were held removable, the court said that the leaving of the mill after the expiration of the term did not work any change in property, and that, when it is said that the removal must be within the term, it means that the party attempting to then take the property will be a trespasser as regards the entry. In another part of the opinion the court stated that the tenant had an unquestionable right to remove the property as personalty. The doctrine in this case can be supported only upon the theory that the property in question was regarded as merely personal property. This doctrine is approved in *Lawrence v. Kemp*, 1 Duer (N. Y.) 363. A few cases apparently give the tenant a reasonable time after the expiration of his term in which to remove this class of fixtures. *Berger v. Hoerner*, 36 Ill. App. 360; *Walsh v. Sichler*, 20 Mo. App. 374; *Shellar v. Shivers*, (208)

Or perhaps it is more properly based upon the theory that the tenant's fixtures, by their annexation, become a part of the realty, subject to the right and privilege of the tenant to remove them during his term.⁵⁹ To this general proposition there exists several modifications, in accordance with

171 Pa. 569. But the position of these cases may be regarded in the light set forth in the case of *Carlin v. Ritter*, 68 Md. 486, 6 Am. St. Rep. 467, where the court said: "The position sustained by the overwhelming weight of authority, both English and American, and ancient and modern, is that, where a tenant quits possession or surrenders the premises unqualifiedly to his landlord without removing or reserving his fixtures, he is understood to make a dereliction of them to his landlord; and the few cases in which the right of property in fixtures has been held to remain unchanged after the termination of the tenancy and the surrender of possession of the premises by the tenant rest upon the particular attendant circumstances, and may be regarded as exceptional, and they do not invalidate the general rule."

⁵⁸ In *Poole's Case*, 1 Salk. 368, it was said by Lord Holt that during the term the soap boiler might well remove the vats, but after the term they became a gift in law to him in reversion, and are not removable. See *Ombony v. Jones*, 19 N. Y. 238; *Northern Central Ry. Co. v. Canton Company of Baltimore*, 30 Md. 355; *McCracken v. Hall*, 7 Ind. 30; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509; *Beckwith v. Boyce*, 9 Mo. 560; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Childs v. Hurd*, 32 W. Va. 68; *Youngblood v. Eubank*, 68 Ga. 634. In *Loughran v. Ross*, 45 N. Y. 792, the court said: "The right of the tenant to remove is a privilege conceded to him for reasons of public policy, and may be waived by him, and will be regarded as abandoned by any acts inconsistent with a claim to the buildings as distinct from the land, and, upon abandonment of the right by the tenant, fixtures erected by him immediately become the property of the landlord as a part of the land. A surrender of the premises after the expiration of the lease is such an abandonment as vests the title in the landlord."

⁵⁹ See *Amos & Ferard, Fixtures*, p. 79; *Ewell, Fixtures*, p. 139.

the particular relation sustained by the tenant to his landlord.

— (a) **Tenant holding over.**

Where a tenant holds over after the expiration of his lease, the weight of authority is to the effect that he has the right to remove his fixtures during the continuance of his possession, upon the theory that he is still a rightful and lawful tenant holding under the provisions of the original lease.⁶⁰

⁶⁰ The case of *Penton v. Robart*, 2 East, 88, was the first case to grant this privilege to the tenant. In this case an action of trespass was brought against the tenant for tearing down and removing a building, a trade fixture, after his term had expired, but while he still continued in possession of the premises. As to the entry upon the land, the tenant was guilty of trespass; but as to the removal of the building the court, per Lord Kenyon, said that "the defendant did no more than he had a right to do; he was, in fact, still in possession of the premises at the time the things were taken away, and therefore there is no pretense to say that he had abandoned his right to them."

In the case of *Weeton v. Woodcock*, 7 Mees. & W. 14, a tenant took a lease of a cotton factory wherein there was a proviso that the lease should be forfeited by the bankruptcy of the tenant. The tenant, having erected a steam boiler and engine upon the premises during the term, became bankrupt, and his assignees entered and took possession, after which the lessor declared a forfeiture under the lease. The assignees then removed the boiler. The court said: "The rule to be collected from the several cases decided on this subject seems to be this; that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. * * * In the present case this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants."

In *Mackintosh v. Trotter*, 3 Mees. & W. 184, Parke, B., in speaking
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There is a presumption, implied in such cases, that the tenant is still holding under the terms of his original lease, with

of the case of *Minshall v. Lloyd*, 2 Mees. & W. 450, said: "I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point; that the principle of law is that whatsoever is planted in the soil belongs to the soil,—*Quicquid plantatur solo, solo cedit*;' that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term."

In *Leader v. Homewood*, 5 C. B. (N. S.) 546, Willes, J., said: "The law as to the limit of time within which a tenant is allowed to sever from the freehold the fixtures which are usually called 'tenants' fixtures' is by no means clearly settled. According to the older authorities, the rule was that he must sever them during the term. But in *Penton v. Robart*, 2 East, 88, it appears to have been considered that the severance might be made even after the expiration of the tenant's interest, if he has not quitted possession. However, in *Weeton v. Woodcock*, 7 Mees. & W. 14, the rule was laid down that the tenant's right continues only during his original term, and 'such further period of possession by him as he holds the premises under a right still to consider himself as tenant.' It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant."

In *Ex parte Brook*, 10 Ch. Div. 100, Thesiger, L. J., said: "It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures, and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy."

In *Loughran v. Ross*, 45 N. Y. 792, the court said: "The general

the consent of the landlord. If the holding over is tortious, the rule, apparently, is not applicable.⁶¹

form of expressing the right of the tenant to remove fixtures is that they must be removed within the term,—that is, the term during which they were erected,—and unless the lessee uses, during the lease, the privilege to sever them, he cannot afterwards do it, * * * but it may be done so long as the possession continues, although the term may have ended, if there has been no new agreement.”

In *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341, Judge Peckham, said: “There is no reason why the right should be lost before he quits possession as tenant, even though he holds over. The rule is based upon a question of public policy, which suggests that the tenant shall remove during his term, i. e., while in possession as a tenant, whatever he has the right to remove at all, so that the landlord may be himself protected, and so that the tenant shall not be permitted, after his surrender of possession, to enter upon the possession of the landlord or his succeeding tenant, and remove what he might have taken before, but which, by leaving, he has tacitly abandoned, and which the landlord may already have let to his succeeding tenant. A regard for such succeeding interests requires the adoption of a rule necessitating the removal of fixtures during the time of possession, but not in all cases during the running of the term.”

So, in *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694, the court said: “That the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron Parke says, under what may be considered an excrescence on the term,—that is, as tenant at sufferance.”

See *Wright v. Macdonnell*, 88 Tex. 140, which the language of Baron Parke, above mentioned, is adopted: Also *Brown v. Reno Electric Light & Power Co.*, 55 Fed. 229; *Davis v. Moss*, 38 Pa. 346; *Darrah v. Baird*, 101 Pa. 265; *Finney's Trustees v. City of St. Louis*, 39 Mo. 178; *Bircher v. Parker*, 40 Mo. 118; *Merritt v. Judd*, 14 Cal. 59; *Morey v. Hoyt*, 62 Conn. 542; *Youngblood v. Eubank*, 68 Ga. 630; *Childs v. Hurd*, 32 W. Va. 66.

⁶¹ “A tenant who, for the better use or enjoyment of leased prem-
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— (b) Tenants at will, or holding for an uncertain period.

Where a tenant holds an estate at will, or a tenancy determinable upon the happening of some contingent or uncertain event, the tenant is allowed a reasonable time after the expiration of his tenancy to remove his trade, domestic, or ornamental fixtures.⁶² Principles of substantial justice re-

ises, erects buildings thereon, may, at any time before his right of enjoyment expires, remove the buildings. If he omit to remove them until his right of enjoyment ceases, and his possession or right to use and occupy the premises becomes wrongful, such an omission is to be deemed an abandonment of his right, and the buildings become a part of the real estate; and if the tenant afterwards sever them, he becomes a trespasser." *Cromie v. Hoover*, 40 Ind. 49.

"A tenant who has put trade fixtures into a building has a right to remove them if it can be done without permanent injury to the freehold, provided the right is exercised within proper time; * * * and this right must be exercised during the term of the lease as fixed by the contract, or during such further period as the tenant may lawfully and rightfully remain in possession." *Allen v. Kennedy*, 40 Ind. 142.

⁶² In *Loughran v. Ross*, 45 N. Y. 792, the court said: "The rule is that whatever fixtures the tenant has a right to remove must be removed before his term expires, except when the time at which the term will end is uncertain, depending upon a contingency, and it may be determined unexpectedly to the tenant, in which case he may be entitled to a reasonable time for removing fixtures after the expiration of the tenancy."

So, in *Ombony v. Jones*, 19 N. Y. 234, the court observed: "The general rule has been laid down in many cases that things which a lessee has annexed to the freehold, if movable at all, must be removed before the expiration of the tenancy. * * * Without questioning at this time the force of the rule, an obvious qualification must be admitted where the tenancy is of an uncertain duration, and is liable to be terminated by the happening of some event on which it depends, or by the act of the lessor, as in the case of a tenancy at will. Where the tenancy is of such a character, the supposed abandonment or gift of the fixture to the reversioner, on

quire that such a rule be conceded in tenancies of this character. Where, however, the statutes of a state prescribe the notice that a landlord shall give a tenant to terminate an estate at will, the tenant has only until the expiration of the term limited in the notice to remove these fixtures.⁶³

which the rule rests, can hardly be imputed to the tenant until he has had a reasonable time to effect the removal."

In the case of *Antoni v. Belknap*, 102 Mass. 193, where a tenant whose term was defeasible on a contingent event, and had been terminated by demand of possession by the landlord, removed certain ice from an ice house upon the leased premises only as the tenant's customers required it, about two months being consumed in its removal, and thereafter immediately removed the ice house, and where it appeared from the evidence that the ice would have become porous and of little value if it had been removed to another building at that time of the year, it was held that, considering the nature and quantity of the property to be removed, and the absence of evidence that any other mode of removal was practicable, the removal was within a reasonable time.

See, also, *Haflick v. Stober*, 11 Ohio St. 482; *Northern Central Ry. Co. v. Canton Company of Baltimore*, 30 Md. 347; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Doty v. Gorham*, 5 Pick. (Mass.) 487; 16 Am. Dec. 417; *Cromie v. Hoover*, 40 Ind. 49; *Sullivan v. Carberry*, 67 Me. 531; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694.

⁶³ In the case of *Erickson v. Jones*, 37 Minn. 459, 35 N. W. 267, where a tenant at will, after having received due notice to quit, as required by the statute, and after being ejected, brought conversion for a small frame workshop left on the premises by him, the court said: "As between landlord and tenant, unless the right to remove fixtures after the expiration of the term is specially reserved in the lease, the rule is well settled that such fixtures must be removed by the tenant before his term expires, or at least while he continues to hold possession as tenant. Where, however, his tenure is uncertain, and such that it may be determined unexpectedly to him, this rule is modified so as to allow a reasonable time for the removal of fixtures after the termination of the lease. * * * This qualification is usually applied to leases of uncertain duration, as for life

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— (c) **Tenant surrendering possession before the expiration of the term.**

A tenant who surrenders possession of the leased premises to his landlord without removing his tenant's fixtures, or without reserving the right, thereby renounces all claim to them.⁶⁴

— (d) **Tenant forfeiting lease.**

The tenant has no right to remove his tenant's fixtures after forfeiture under the terms of the lease, where there has

or at will, or until the happening of some event. But where, as in this state, by statute, leases at will can only be terminated after reasonable notice, it would seem that in ordinary cases the time limited for the expiration of the term is rendered sufficiently definite to warrant the application of the general rule. In any event, we see no reason why it should not have been applied in the case at bar."

⁶⁴ In *Shepard v. Spaulding*, 4 Metc. (Mass.) 416, the court said: "Daniel Spaulding was the owner of the soil. He leased the mill and mill privilege, with a small tract of land, to Danolds, for an indefinite time, during which Danolds erected the house, and afterwards, for a valuable consideration, surrendered his lease; for though the words are that he 'reconveyed' the premises to his lessor by a lease similar to that under which he held them, the legal effect was a surrender of the lease and a merger of the term. The conveyance by a lessee for years of all his leasehold interest to the lessor and owner in fee is, in legal operation, a surrender. * * * By this surrender, the house erected by the tenant, and conveyed without reservation, became permanently annexed to the freehold as effectually as if it had been built by the owner of the soil." See *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Walsh v. Sichler*, 20 Mo. App. 374; *Thropp's Appeal*, 70 Pa. 395.

A tenant in possession under a lease which does not provide that he may remove his fixtures and improvements cannot, after he has surrendered possession to his landlord, re-enter and remove his fixtures. *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700.

been an enforcement of the right of forfeiture by the landlord by a re-entry, or by judicial proceedings in the way of ejectment, or something equivalent thereto.⁶⁵

⁶⁵ In the case of *Pugh v. Arton*, L. R. 8 Eq. 626, 38 Law J. Ch. 619, the facts in which appear from the opinion of the chancellor given below, it was held that, in the absence of special contract, a tenant's fixtures could not be removed after the termination of the lease by forfeiture. Sir R. Malins, V. C., said: "Under the lease of February, 1865, a house was demised by the plaintiff to John Vaughn for a term of years, which, according to its duration, has not yet expired; but that lease contained a covenant or proviso that if the tenant did certain acts, amongst which was making an assignment for the benefit of his creditors, the landlord should have a right to re-enter; that is, in fact, the same thing as a forfeiture at the option of the landlord, not, of course, absolute, but at the landlord's option, so that the lease was in that way voidable, not void, on the happening of any of the specified events. On the 2d of March, 1869, Vaughn made an assignment for the benefit of his creditors, which, without doubt, amounted to an act of bankruptcy, and was a forfeiture of the lease upon the re-entry of the landlord. The fact did not become known to the plaintiff until the 11th of March, and on the twelfth * * * he gave notice to Vaughn that he intended to treat the lease as forfeited, but he did not enter until the 14th, and on that day, having a right to determine the lease, he did so by entering, and revesting the estate in himself. Vaughn carried on the business of a bookseller, and there were certain fixtures in the house admitted on both sides to be tenant's fixtures. * * * A great many cases have been cited, most of which are collected in Woodfall's *Landlord & Tenant* [page 535], where it is laid down that when a lease expires by lapse or forfeiture by the act of the tenant (the right being the same in either case), if the tenant does not remove the fixtures during the continuance of the lease, or during the period whilst he remains in lawful possession, it is too late for him to do so after the landlord has entered for forfeiture."

In *Weeton v. Woodcock*, 7 Mees. & W. 14, a tenant took a lease of a cotton factory, in which there was a proviso that the lease should be forfeited by the bankruptcy of the tenant. During the term the tenant erected a steam engine on the premises, and afterwards be-

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— (e) Removal prevented by the landlord.

But where the tenant is wrongfully prevented, by the act of the landlord, from removing his tenant's fixtures before

came bankrupt. His assignees entered and took possession, and thereafter the lessor entered for forfeiture. It was held, through the opinion of Anderson, B., that the right of the tenant to remove the steam engine ceased after the entry for forfeiture. To the same effect see *Minshall v. Lloyd*, 2 Mees. & W. 450.

There must be an enforcement of the right of forfeiture by some positive act on the part of the lessor, either by re-entry or something equivalent thereto. In *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700, the lease was forfeited for the nonpayment of rent, and the lessee ousted under a writ of restitution.

In *Morey v. Hoyt*, 62 Conn. 542, there was a dispossession under summary proceedings.

In *Ex parte Hemenway*, 2 Low. 496, Fed. Cas. No. 6,346, there was only a notice to quit; but the court questioned the doctrine that a forfeiture destroyed the right to remove a tenant's fixtures, and cited *Stansfeld v. Borough of Portsmouth*, 4 C. B. (N. S.) 120. But in this latter case there was a covenant in the lease that certain things should remain, and certain things should be removed. See *Pugh v. Aston*, L. R. 8 Eq. 626.

In the case of *Davis v. Moss*, 38 Pa. 346, it would appear that, in accordance with the law of that state, a tenant who forfeits a lease has no right to take away his tenant's fixtures after the act of forfeiture. Woodward, J., said: "But here there was a forfeiture of estate by discontinuance of mining operations for twelve consecutive months and more. The entry of the company's agents to clean and grease the engine from time to time was not a continuance of mining operations, within the meaning of the lease. Nor was any entry by the landlord necessary to declare the forfeiture, for he was already in possession for all purposes except mining. * * * The law of entry for breach of condition in the tenure is somewhat different with us from what it is in England and in many of our surrounding states. * * * In England, the forfeiture, however strongly the condition is expressed in the deed, is not complete until the landlord elects, by some positive act, to take advantage of it. With us it depends on the terms of the instrument, unless there be

the expiration of his term, he is not thereby precluded from exercising his right of removal.⁶⁶ Thus, where a landlord gets out an injunction, and thereby prevents the tenant from exercising his right of removal before the expiration of his term, the tenant, upon dissolution of the injunction, is allowed a reasonable time within which to remove such fixtures, even though his term has expired, and he be out of possession of the leased premises.⁶⁷

evidence to affect the landlord with a waiver of the breach, like the receipt of rent, or other equally unequivocal act. * * * A discontinuance of mining operations for nearly four years before the sheriff's sale must be held to work a forfeiture of the lease, or we unmake the contract of the parties. There is nothing in the case from which we can imply the landlord's intention to waive the payable breach, and therefore he must have the benefit of it, and we must say that, the term being ended, the right of the tenant or of the sheriff's vendee to remove the engine fell with the term." See *Kutter v. Smith*, 2 Wall. (U. S.) 491; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. (N. Y.) 276.

It has been held that the forfeiture must be judicially determined. *Keogh v. Daniell*, 12 Wis. 181; *Whipley v. Dewey*, 8 Cal. 36. But where a lease was terminated by an eviction in pursuance of a judgment in summary proceedings for the nonpayment of rent, a tenant has a reasonable time thereafter to remove his trade fixtures. *Meader v. Brown*, 5 N. Y. St. Rep. 839.

⁶⁶ *Bircher v. Parker*, 40 Mo. 118; *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33.

In *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393, a landlord's refusal to allow his tenant to remove his trade fixtures upon his being dispossessed for the nonpayment of rent was held to amount to a conversion.

So, in *Podlech v. Phelan*, 13 Utah, 333, the restraint exercised by the landlord in preventing the tenant from selling his trade fixtures before the expiration of his term gave him the right to remove them after the expiration of the term.

⁶⁷ *Mason v. Fenn*, 13 Ill. 525; *Bircher v. Parker*, 40 Mo. 118.

— (f) **Renewal of the lease.**

Where a tenant renews his lease of the demised premises without removing or reserving any right to remove his tenant's fixtures, the general weight of authority is to the effect that he thereby abandons his right of removal as to such fixtures.⁶⁸ The same effect is produced by any other

⁶⁸ In *Loughran v. Ross*, 45 N. Y. 792, the court said: "In reason and principle, the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease, and returned to the premises. A lease of lands and premises carries with it the buildings and fixtures on the premises, and the tenant, accepting a lease of the premises without excepting the buildings, takes a lease of the land with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it."

In *Sanitary Dist. of Chicago v. Cook*, 169 Ill. 184, 48 N. E. 461, 39 L. R. A. 369, 61 Am. St. Rep. 161, the court said: "The great weight of authority seems to be that where, at the expiration of a lease, during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right to remove them, such fixtures erected under the former lease cannot be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous. The reason given is because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind, without reserving

new agreement with the landlord in respect to the leased premises,⁶⁹ but this does not apply where tenants hold over

his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterward estopped from denying."

In *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364, where a building was sold under an execution, and purchased by a tenant from year to year of land on which the building stood, and the tenant afterwards took a lease of the land without expressly reserving her right in such building, the court said: "The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy, and, being in the nature of a privilege, it must be exercised before the expiration of the term, or before he quits possession. If the right to remove other fixtures exists by virtue of some agreement, then it must be exercised in like manner. By entering upon a new lease, in which the tenant's rights are not reserved, the rights which may have existed under the former tenancy are determined, and this is true, even where there is a continuous holding of the premises, but not under the same lease. A tenant may remain in possession after the old lease has expired; but unless he reserves the right under the new lease to remove the fixtures upon the land, the right will be deemed to have been abandoned, and they will become the property of the landlord."

In *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694, the court said: "When the same tenant continues in

⁶⁹ In *Merritt v. Judd*, 14 Cal. 60, where a tenant, being permitted by the lease, made a contract for the purchase of the property, which he failed to fulfill, it was held that he had lost his right to remove his tenant's fixtures. *Perkins v. Swank*, 43 Miss. 349; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Heap v. Barton*, 12 C. B. 274. But where the landlord released a retiring member of partners who were his tenants in a building leased for a bakery, by surrendering to him a copy of the lease, marked "Canceled," and took a new lease from the remaining partner for the unexpired term, which was identical with the old lease, except that the lessee was given the right of assignment, it was held that this was not such a new leasing as to preclude a right to remove trade fixtures. *Baker v. McClurg*, 198 Ill. 28.

under an original lease, either permissively or impliedly.⁷⁰ The rule is based on the ground that a lease of land carries

possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no right to the lessee in fixtures annexed during the previous term, and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition, this is not the extension of or holding over under an existing lease. It is the creation of a new tenancy, and it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease, which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and fixtures annexed, which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old."

Where a hotel has passed through the hands of several lessees, and the fixtures used therein in connection with a cigar stand have likewise changed hands, it must be shown that the right to remove them was asserted at the expiration of each lease of the house, in order that they may retain the incidents of removability as trade fixtures. *Leman v. Best*, 30 Ill. App. 323.

The rule, however, does not apply where there is an original agreement between landlord and tenant treating as personalty certain fixtures sold by the landlord to the tenant, and where there is a subsequent renewal of the first lease without any reservation or mention of the articles. It was so held in respect to marble counters and bar, table, buffet, range, boiler, etc., in a bar and restaurant. *O'Brien v. Mueller*, 96 Md. 134.

See, also, *Jungerman v. Bovee*, 19 Cal. 355; *Marks v. Ryan*, 63 Cal.

⁷⁰ See post, 38a, "Tenant Holding Over"; *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510; *Ross v. Campbell*, 9 Colo. App. 38; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694; *Estabrook v. Hughes*, 8 Neb. 496; *Davis v. Moss*, 38 Pa. 346; *Darrah v. Baird*, 101 Pa. 265.

with it the buildings and fixtures thereon, and that a tenant, by accepting a new lease of the premises without excepting

107; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509; *Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370, 6 Am. St. Rep. 467; *Bauernschmidt Brew. Co. v. McColgan*, 89 Md. 135, 42 Atl. 907; *Williams v. Lane*, 62 Mo. App. 66; *Gerbert v. Trustees of Congregation of Sons of Abraham*, 59 N. J. Law, 160; *McIver v. Estabrook*, 134 Mass. 550; *Merritt v. Judd*, 14 Cal. 60; *Shepard v. Spaulding*, 4 Metc. (Mass.) 416; *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341.

The leading contrary opinion is that of Justice Cooley in *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, where he states in regard to this rule: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures, in the first place, are equally influential to save to him, on a renewal, what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord.'" And in regard to the fact that the tenant, by accepting a new lease, acknowledges the title of the landlord to his tenant's fixtures under the former tenancy, he said: "But unless it [the new lease] does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion, it ought not to be held to include them, unless from the lease itself an understanding to that effect is plainly inferable."

So, in *Second Nat. Bank of Beloit v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514, the court followed and quoted Judge Cooley in the case above mentioned, and said: "In the case of grantor and grantee, the usual status of the parties is that, before the grant is made, the whole right is in the grantor, and the grantee is purchasing all his rights. In the case of a tenant having made and owning fixtures and machinery of equal or greater value than the realty on

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his tenant's fixtures, thereby abandons, and acknowledges the title of the landlord to, the same, and is estopped to controvert it.⁷¹

which it stands, and being in the actual possession, and with the right to remove the same, treating with his landlord or the grantee of such landlord for a new lease, he is not supposed to treat for a lease of what he already owns, but for a lease of what the landlord owns; and if he accepts a lease which does not in clear terms cover the property which he himself owns, it ought not, as against him, and for the purpose of working a release of his right to the landlord, be construed to cover such property."

So, in *Devin v. Dougherty*, 27 How. Pr. (N. Y.) 455, the court, anent this rule, said: "As the new lease was intended merely to provide for a further occupancy of the premises, and that for the same purposes, I see not why it was necessary for the tenant to reserve in it any rights in regard to a thing which was his, and which it must have been understood he was to continue to use as his own during his new term. He hired for a second time his landlord's premises; but how can that be said to be also a hiring of property, upon these premises, which belonged to himself, and which, as yet, he had a right to use upon those premises under a lease still in force? What need was there of any agreement as to what he then had a right to remove, and an equal right to continue to use upon the premises as long as he secured the right to the occupancy of such premises? To hold that the acceptance of the second lease by the tenant implies the surrender of his claim to property standing upon the premises, so that he cannot remove it now, would be to hold that, after such lease, he could not have removed it even during the first term,—a position which I think cannot be successfully maintained."

So, in the case of a provisional lease, in *Wright v. Macdonnell*, 88

⁷¹ "The reason given is because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind, without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterwards estopped from denying." *Sanitary Dist. of Chicago v. Cook*, 169 Ill. 184, 48 N. E. 461, 39 L. R. A. 369, 61 Am. St. Rep. 161.

§ 39. Rights to fixtures between landlord and tenant as affected by agreement.

Heretofore, in this chapter, the general operation of the law of fixtures between landlord and tenant has been considered independent of the agreement of the parties. It is clear, however, that, between landlord and tenant, the whole subject of fixtures lies open to agreement, and that the parties, by proper contract, may regard as personalty that which the law would ordinarily treat as realty, or *vice versa*, and that they may likewise limit, extend, or otherwise modify the rights and duties of one to the other.⁷²

As to annexed chattels that are personalty or realty, as between the parties, according to the usual tests in the law of fixtures, irrespective of the exceptions in favor of the tenant as to his trade, domestic, or ornamental fixtures, the ef-

Tex. 140, 30 S. W. 907, where an agreement was made between the lessor and lessee of mining property, whereby the lessee should work the mines sixty days, in order to give sufficient time for the drawing up of a longer lease, and for a longer time, if the sixty days were not a sufficient time, and where such additional time was given, it was right to remove his tenant's fixtures, for the reason that the agreement did not show a leasing, or amount to a re-leasing by the lessee of the fixtures placed by him upon the land during the original term, and for the further reason that the transaction, being of such a temporary nature, unquestionably showed that the right was not intended to be lost. The court criticised the rule that the right of removal is lost by the tenant taking a new lease, and intimated that, upon a bare presentation of the facts, it would follow Judge Cooley in his opinion in *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362.

⁷² See chapter 5, "Agreements as to the Character of Fixtures," and notes 1, 2.

fect of agreements in this connection has been fully discussed in chapter five of this work.⁷³

— (a) Agreement as to tenant's fixtures.

An agreement between landlord and tenant, giving to the tenant the right to remove his tenant's fixtures, thereby makes them personal property as between the parties.⁷⁴ If, by the agreement of the parties, the tenant's fixtures are personalty, then it would seem logical that the tenant should be accorded the same privilege as to the time of removal of his tenant's fixtures as to his other personal property; yet the decisions are not unanimous to this effect,—some of them requiring, nevertheless, that they be removed before the expiration of the term,⁷⁵ in accordance with the general rule.

⁷³ See ante, c. 5, "Agreements as to the Character of Fixtures."

⁷⁴ "It is settled that landlord and tenant may, by their agreements, treat as personal property improvements which would otherwise be part of the realty, and thus convert them into personal property, to all intents and purposes, as between themselves." Winslow, J., in *Fitzgerald v. Anderson*, 81 Wis. 342, 51 N. W. 554, citing *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568.

"The principle is well settled that parties may treat as personal property machinery which would otherwise be part of the realty, and thus convert it into personal property as between themselves." Winslow, J., in *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110.

An express agreement between landlord and tenant excepting engines, machinery, etc., from surrender to the landlord at the expiration of the lease, gives to those fixtures the character of personal property, and not of trade fixtures. *Lake Superior Ship Canal, Ry. & Iron Co. v. McCann*, 86 Mich. 106, 43 N. W. 692.

See *White's Appeal*, 10 Pa. 252; *Handforth v. Jackson*, 150 Mass. 149; *Dryden v. Kellogg*, 2 Mo. App. 87; *Brearley v. Cox*, 24 N. J. Law, 287; *Adams v. Goddard*, 48 Me. 212; *Merritt v. Judd*, 14 Cal. 59; *Wick v. Bredin*, 189 Pa. 83; *Hartwell v. Kelly*, 117 Mass. 235.

⁷⁵ Where the property, by express agreement, has been made per-

The agreement made between the parties controls and determines the rights of the parties. If the parties specifically agree that the fixtures in question shall be personalty, or shall belong to the tenant, the courts give the agreement that effect;⁷⁶ but an agreement giving a tenant the right to re-

sonalty, it cannot be contended that it is tenant's fixtures, and therefore removable only during the tenancy. *Lake Superior Ship Canal, Railway & Iron Co. v. McCann*, 86 Mich. 106, 48 N. W. 692. In this case the lease provided that at its termination the lessee should surrender the premises, with all the improvements excepted; and it was held that the intention of the parties was to make the engines and other machinery personal property.

So, in *Wright v. Macdonnell*, 88 Tex. 140, under somewhat similar circumstances, it was held that the failure of the tenant to remove his fixtures at the expiration of his term did not forfeit his right, but that he had a reasonable time thereafter to remove the same, the lessee having the same right as any licensee.

So, in *Smith v. Park*, 31 Minn. 70, a dwelling house was removable within a reasonable time after the expiration of the term, where the lease gave the tenant the right to remove at the expiration of the term. But see *Darrah v. Baird*, 101 Pa. 265, where the contrary was held under similar circumstances. See, also, *Kuhlmann v. Meier*, 7 Mo. App. 260; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110. But in New York the contrary rule seems to obtain. *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 345; *Talbot v. Cruger*, 151 N. Y. 120; *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. 276.

⁷⁶ See chapter 5 of this work.

In *Inhabitants of First Parish in Sudbury v. Jones*, 8 Cush. (Mass.) 189, the court said: "Whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil. 'Quicquid plantatur solo, solo cedit.' * * * An exception is admitted to this general rule, where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings, that, when annexed to the realty, they shall not become parts of it, but shall still remain the property of the person annexing them. In such case the law gives effect to the

move his fixtures is construed by some of the courts as a license granted by the landlord, to be executed by the tenant according to the general rule.⁷⁷ Where, however, the landlord gives the tenant, by agreement, the right to remove his fixtures after the expiration of the term, this is an express waiver of his general rights under the law.⁷⁸ So, where he contracts with the tenant to sell or buy his trade fixtures, the tenant does not lose his right of removal, even though his term has ended, and possession of the premises has been surrendered.⁷⁹ The parties may restrict, by agreement, the rights of removal by the tenant.⁸⁰

agreement of the parties, and personal property, though affixed to the realty, retains its original characteristics, and belongs to its original owner. Within this exception are included not only cases where there is an express agreement between the parties that personal property shall not become real estate by annexation to the soil, but also that large class of cases which arise between landlord and tenant, in which, by agreement, either express or implied, from usage or otherwise, the tenant is allowed to retain as his own property, if seasonably removed, fixtures erected by him for purposes of trade, ornament, or ordinary use, upon leasehold premises during his tenancy."

⁷⁷ *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341.

⁷⁸ *Smith v. Park*, 31 Minn. 70; *Chalifoux v. Potter*, 113 Ala. 215; *Kuhlmann v. Meier*, 7 Mo. App. 260; *McCracken v. Hall*, 7 Ind. 30; *Gray v. Oyler*, 2 Bush (Ky.) 256.

⁷⁹ In *Torrey v. Burnett*, 38 N. J. Law, 457, where the landlord agreed to sell a trade fixture for the tenant, and failed to so do, it was held that the tenant had a reasonable time within which to remove the same, even though his term had expired, and his possession had been surrendered. See *Thorn v. Sutherland*, 123 N. Y. 236; *Josslyn v. McCabe*, 46 Wis. 591.

⁸⁰ In *Ex parte Morrow*, 1 Low. 386, Fed. Cas. No. 9,850, the court said: "The right of the tenant to remove trade fixtures may well

—— (b) Parol agreements.

Agreements between landlord and tenant, made by parol, are binding between the parties when made before or at the time of the annexation of the chattel, and they are generally held binding, even when made after the annexation of the chattel,⁸¹ upon the theory that contracts made respecting such fixtures are mere licenses, the same as the right granted by a lessor to cut and take away a tree upon his premises; or, at all events, such fixtures are not such interests in land as to come within the fourth section of the statute of frauds.⁸² Parol agreements, however, are always sub-

enough be called rather a privilege than a property, and it is one that he may lawfully waive or modify by the terms of the lease, without the form of either a pledge or a mortgage." *Simpson Brick Press Co. v. Wormley*, 61 Ill. App. 460.

⁸¹ *Fuller v. Tabor*, 39 Me. 519; *Hines v. Ament*, 43 Mo. 298. See chapter 5, *supra*, "Agreements as to the Character of Fixtures."

In *Ex parte Ames*, 1 Low. 567, Fed. Cas. No. 323, the court said: "It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this, some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. * * * Growing wool or crops may be sold by parol, with a parol license to sever them; and I am much inclined to think that trade fixtures might be." See *Curtis v. Riddle*, 7 Allen (Mass.) 185; *Morris v. French*, 106 Mass. 326; *Aldrich v. Husband*, 131 Mass. 480.

⁸² *Dubois v. Kelly*, 10 Barb. (N. Y.) 507; *Powell v. McAshan*, 28 Mo. 70. Tenant's removable fixtures, when sold or contracted about separately from the land, do not come within the fourth section of the statute of frauds, as being a sale of an interest in land. *Lee v.*

ject to the qualification imposed by the rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument,"⁸³ although admissible to explain the terms of the written contract.⁸⁴

§ 40. Covenants and stipulations in a lease.

The lessor and lessee, by covenant or stipulation in a lease, may enlarge, qualify, or entirely abrogate the right of the tenant to remove his tenant's and other removable fixtures.⁸⁵ This effect is sometimes produced by the use in a lease of terms more comprehensive and inclusive than the term "fixtures." Thus, covenants in a lease to repair, to yield up in repair, and in relation to improvements, additions, erections, and alterations, are terms held inclusive of fixtures.⁸⁶ In this connection, the construction to be placed on such terms is the ordinary rules in regard to the interpretation of a contract, together with the application of the principle that general words are restricted by the particular words which precede them, and come within the rule by which they ought

Gaskell, 45 Law J. Q. B. 540; Ross' Appeal, 9 Pa. 491; Foster v. Mabe, 4 Ala. 402.

⁸³ 1 Greenleaf, Evidence, § 275; Jungerman v. Bovee, 19 Cal. 354; Lewis v. Seabury, 74 N. Y. 409, 30 Am. Rep. 311; Stephens v. Ely, 14 App. Div. (N. Y.) 202.

⁸⁴ Gray v. Oyler, 2 Bush (Ky.) 256.

⁸⁵ McCracken v. Hall, 7 Ind. 30; Higgins v. Riddell, 12 Wis. 587; Gray v. Oyler, 2 Bush (Ky.) 256.

⁸⁶ Term "improvements" includes fixtures. French v. City of New York, 16 How. Pr. (N. Y.) 220, 29 Barb. 363; Merritt v. Judd, 14 Cal. 59; Hasty v. Wheeler, 12 Me. 434. See, as to erections, Holbrook v. Chamberlin, 116 Mass. 155; Esterley's Appeal, 54 Pa. 192. As to term "repairs," see Mason v. Fenn, 13 Ill. 525.

to be construed as applicable to persons and things *ejusdem generis*.⁸⁷

Generally speaking, covenants in a lease of a general nature, including and relating to fixtures, must be interpreted according to the intention of the parties as shown from the instrument of agreement. The effect of covenants to repair and to yield up in repair the demised premises, and all erections and improvements to be thereafter added and built thereon, and similar provisions in a lease, upon the right of the tenant to remove his tenant's fixtures, is a question of much importance, and varies according to the interpretation and construction placed upon the covenants of each specific lease.

— (a) Covenants to repair.

Where a lease contains the simple covenant to keep the demised premises in repair during the tenancy, and to yield them up in repair at the expiration of the term, it appears that the covenant will be ordinarily construed, in the absence of any special limiting words including subsequent erections made during the term, to pertain only to those articles that formed a part of the demised premises at the execution of the lease, and to those irremovable fixtures that subsequently became a part of the realty, and not to include the tenant's fixtures.⁸⁸

⁸⁷ Broom, Legal Maxims, 588; 21 Am. & Eng. Enc. Law (2d Ed.) p. 1012.

⁸⁸ In *Mason v. Fenn*, 13 Ill. 525, where a flouring mill was leased for a term of years, the lessee covenanting to restore the premises in as good repair as received, the tenant was obliged, during the term, to put in a new boiler, backstand, and mud valve in order to run the mill. It was held that the tenant could remove the boiler (230)

— (b) Erections or additions.

A covenant in a lease to repair and to yield up in repair the demised premises, and all future erections or additions

and attachments, the court saying: "We agree in opinion with the circuit judge, that the articles in question were fixtures, within the agreement of the parties, for which compensation was to be made by the landlord, or the tenant might remove them at the expiration of the term. They were clearly of a beneficial character, for without them the mill could not be used. The old boiler became worthless, and it was absolutely necessary to the enjoyment of the demised premises that a new one should be procured. We are not inclined to hold that the landlord had the right to retain the articles, because the tenant covenanted to restore the premises in as good a state of repair as he received them, with the exception of natural wear and casualty by fire. The parties could hardly have contemplated such extensive expenditures in the way of reparations. It was their intention that the tenant should incur all necessary expense in keeping the buildings and machinery in repair; not that he should be compelled, at his own cost, to erect buildings and provide new engines and boilers in the place of those that could not be repaired. For any additions to the property in the way of repairs, the tenant could not demand compensation, nor could he detach the materials used and take them away. But the old boiler, without any fault on his part, became incapable of being repaired, and without a new one the mill would not operate. It was not his duty, under such circumstances, to furnish a new boiler at his own expense for the benefit of the landlord. The articles in question were entirely new, and were put in the mill for the temporary convenience of the tenant, and they could be removed without detriment to the mill, and without injury to the landlord. The agreement secured the tenant compensation for these improvements, or the right to take them away at the end of the term."

A covenant by the tenant to keep all buildings and erections in good repair does not destroy his right to remove machinery placed by him upon the premises. *Brown v. Reno Electric Light & Power Co.*, 55 Fed. 229. See *Deeble v. McMullen*, 8 Ir. Com. Law, 355. But in *Murray v. Moross*, 27 Mich. 203, where the lessee covenanted to keep in repair and to deliver up at the end of the term, etc., the de-

upon the same, includes, besides the premises as they were at the time of the demise, all new buildings and additions added to old buildings which are attached to the realty, but not other tenant's fixtures, such as machinery, boilers, etc., and articles of a tenant that are mere personalty. The term "erections or additions" apparently applies only to buildings.⁸⁹

mised premises, it was held that he could not remove a box stall placed by him in a barn upon the premises, if the removal would injure the freehold. But in England the effect of such a covenant appears to abrogate the tenant's right of removal of his tenant's fixtures. *Turesher v. East London Water Works*, 4 Dowl. & R. 62, 2 Barn. & C. 608; *Pyot v. St. John*, Cro. Jac. 329; *Brown v. Blunden*, Skin. 121; *Penry's Adm'x v. Brown*, 2 Starkie, 403; *Mansfield v. Blackburne*, 8 Scott, 720, 6 Bing. N. C. 427; *Argles v. McMath*, 14 Can. Law T. 462.

⁸⁹ In *Holbrook v. Chamberlin*, 116 Mass. 155, where lessees covenanted to deliver up the premises and all future erections and additions to or upon the same at the end of the term in as good order as at the time of the execution of the lease, it was held that the lessees were entitled to remove all machinery in the nature of trade fixtures or personal property put in during the term, notwithstanding the covenants in the lease. The court said: "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order 'all future erections or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to,—putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease,—and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term."

So in *Liebe v. Nicolai*, 30 Or. 364, dynamos and other electrical machinery were held not erections and additions, within the covenant.

In *Naylor v. Collinge*, 1 Taunt. 19, where the lessee covenanted (232)

— (c) Improvements.

Where a lease contains the covenant to yield up the demised premises in repair, together with all improvements placed upon the premises, the term "improvements" is more comprehensive than the word "fixtures," and includes the latter; that is, the term embraces all irremovable fixtures, all tenant's fixtures, but apparently not those articles which are so attached as to be in their nature mere personalty.⁹⁰ Im-

that he would well and sufficiently repair the demised premises, and all erections and buildings then built, and all erections and buildings that might thereafter be built, upon the premises, and to yield up the same in repair at the end of the term, it was held that the covenant included erections and buildings erected, built and used by the tenant on the premises for trade purposes, where such erections were let into and fixed to the soil and freehold; but not those erections and buildings lying upon the surface of the ground, and in their nature mere chattels.

⁹⁰ In *French v. City of New York*, 16 How. Pr. (N. Y.) 220, 29 BARO. 363, where the lessees of premises known as "Castle Garden" covenanted to surrender the demised premises, and all improvements that may have been placed by them upon the premises during the term, to the lessees at the end of the term, it was held that such a covenant included gas pipes, burners, gas ladders, gas meters, lumber in hat room, doors, hinges, locks, floor of stage, glass case, benches in the gallery and under the gallery, woodwork and canvas constituting the stage, picket fence on the bridge leading to the garden, sheds on the north and south sides of the building, fixtures, and ticket office, and the board fence on the north side of the building. The court said: "Improvements clearly, in the lease here used, embrace every addition, alteration, erection, or annexation made by the lessees during the demised term to render the premises more available and profitable or useful and convenient to them. It is a more comprehensive word than 'fixtures,' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the

provements, however, that are required of the tenant by the lease are not removable by the tenant.⁹¹

premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded."

A greenhouse laid upon walls built to receive it, and embedded in mortar, is an improvement, within the terms of a covenant to yield up the demised premises and all future improvements. *West v. Blakeway*, 2 Man. & G. 729, 3 Scott, N. R. 218, 9 Dowl. 846, 10 Law J. C. P. 173, 5 Jur. 630. Likewise, two millstones substituted by the tenant for old ones upon the premises. *Martyr v. Bradley*, 9 Bing. 24. So, a veranda, the lower part of which is attached to posts fixed in the ground. *Penry's Adm'x v. Brown*, 2 Starkie, 403. Likewise, a steam engine fastened to a frame of timber bolted or spiked to timbers bedded in the ground, and used in working a quartz ledge. *Merritt v. Judd*, 14 Cal. 59. So, a brick house erected by a tenant during his term. *Gett v. McManus*, 47 Cal. 57. A wooden floor put in a bicycling and skating rink is an improvement, within a covenant in the lease reserving the right to all improvements to the lessor. *Harris v. Kelly* (Pa.; 1888) 13 Atl. 523.

In *Parker v. Wulstein*, 48 N. J. Eq. 94, where a lease contained the covenant that all improvements of the building should belong to the lessor at the expiration of the term, it was held that shelves nailed to boards fastened to the wall, and resting on counters not fastened to the wall or floor, and a furnace with hot-air flues extending to holes cut in the floor, and a large awning over the front windows, were improvements, and not removable.

So, in *Center v. Everard*, 19 Misc. Rep. (N. Y.) 156, wainscoting, baseboards, a paneled mahogany ceiling attached to a saloon bar, so as to form one piece with it, a marble floor, and water closets were held irremovable under a covenant in the lease that alterations and improvements by the tenant should be deemed permanently annexed to the freehold.

But in *Hey v. Bruner*, 61 Pa. 87, where tenants covenanted to

⁹¹ *Peirce v. Grice*, 92 Va. 763; *Gett v. McManus*, 47 Cal. 56; *City of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. (N. Y.) 537; *City of New York v. Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231; *Deane v. Hutchinson*, 40 N. J. Eq. 83.

— (d) **Alterations.**

An alteration is a change or substitution of one thing for another. A covenant to the effect that alterations shall inure to the benefit of the landlord includes changes and substitutions made in the demised premises. Thus, the substitution of one fixture for another is an alteration; so, folding doors placed in a house are an alteration.⁹²

— (e) **Buildings.**

A covenant in a lease to leave in repair all buildings erect—make alterations, additions, and improvements of a permanent character, and to introduce machinery necessary to the purpose of the business, and that the permanent additions and improvements should remain on the property at the expiration of the lease, and belong to the lessor, and where the tenant put up a building 24x60 feet, three stories high, and costing \$2,200, and put in an engine screwed into a separate foundation, a boiler, and other machinery, it was held that the building satisfied the provisions of the covenants, and that the engine and boiler, etc., were removable as trade fixtures. See, also, *Lemar v. Miles*, 4 Watts (Pa.) 330.

So, in *Loeser v. Liebmann*, 60 Hun, 579, 14 N. Y. Supp. 569, where there was a provision in a lease that all improvements placed in the building by the lessees should be deemed fixtures not to be removed, viz., elevators, boilers, heating apparatus, etc., it was held that an engine, duplex pump, and a pressure tank to operate an electric lighting apparatus did not come within the above-named improvements.

⁹² See *Whitenack v. Noe*, 11 N. J. Eq. 413. The erection of a wooden building, twelve feet high, upon the demised premises, and capable of removal without injury to the premises, is an alteration. *Whitwell v. Harris*, 106 Mass. 532. But where a lease provided that alterations should inure to the benefit of the premises at the expiration of the lease, it was held that a brick building, separate and by itself, erected by the tenant as a covering for an engine, was not an alteration or an addition, but a trade fixture, and removable. *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229.

ed or to be erected upon the premises includes wings and additions made to a house.⁹³

— (f) Stipulations as to rent.

Stipulations in a lease to the effect that improvements, erections, etc., shall go to the lessor at the expiration of the lease upon nonpayment of the rent by the tenant, usually make the payment of rent a condition precedent to the exercise of the right of removal by the tenant;⁹⁴ but such stipulations may be waived by the subsequent acts of the parties.⁹⁵

— (g) Stipulations granting right to lessor to purchase.

A stipulation granting to the landlord the right to purchase the fixtures of the tenant does not affect the right of the lessee to remove them.⁹⁶

— (h) Stipulations granting fixtures to landlord.

An agreement between lessor and lessee to the effect that the fixtures erected by the tenant upon the demised premises

⁹³ *Harman v. Cummings*, 43 Pa. 322; *Holbrook v. Chamberlin*, 116 Mass. 155. Lime kilns erected with brick and mortar, with their foundations let into the ground, are within this covenant. *Thresher v. East London Water Works*, 2 Barn. & C. 608, 4 Dowl. & R. 62. But certain sheds, called "Dutch barns," are not. *Dean v. Allalley*, 3 Esp. 11. Erections and buildings used for trade purposes, not let into the ground and freehold, but built and supported on blocks or pattens of wood, are not within the covenant. *Naylor v. Collinge*, 1 Taunt. 19.

⁹⁴ *Mathinet v. Giddings*, 10 Ohio, 364; *Merritt v. Judd*, 14 Cal. 59; *Whited v. Hamilton*, 15 Hun (N. Y.) 275.

⁹⁵ *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341.

⁹⁶ *Massachusetts Nat. Bank v. Shinn*, 18 App. Div. (N. Y.) 276.

shall belong to the landlord at the expiration of the term gives to the landlord a vested interest in them.⁹⁷

§ 41. Custom as affecting the tenant's rights of removal.

An established custom of the country or place in respect to fixtures, as between landlord and tenant, may operate in the same manner as a contract in determining the removability of fixtures placed by the tenant upon the leased premises;⁹⁸

⁹⁷ Thrall v. Hill, 110 Mass. 328; Cook v. Champlain Transportation Co., 1 Denio (N. Y.) 91.

⁹⁸ In Van Ness v. Pacard, 2 Pet. (U. S.) 137, where a tenant had been allowed to prove a usage and custom to the effect that tenants were permitted, in the city of Washington, to make removals of buildings erected by them upon the demised premises during the term, the court said: "The second exception proceeds upon the ground that it was not competent to establish a usage and custom, in the city of Washington, for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant in respect to matters in which the parties are silent may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it. * * * The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury."

So, a custom in the city of Milwaukee that lessees of vacant lots under ground leases have the privilege of removing buildings erected by them at or before the expiration of the term was, in the absence of an express agreement in the lease or otherwise, operative and effective. Keogh v. Daniell, 12 Wis. 163.

But in Hawaii, in the case of Kahinu v. Aea, 6 Hawaii, 68, the custom among natives to remove wooden buildings placed upon the premises by themselves was held immaterial in determining whether the same was a part of the realty in accordance with the American, English and continental law.

See, also, Davis v. Jones, 2 Barn. & Ald. 165; Culling v. Tuffnal,

but the custom of the country can have no effect as to fixtures when there is an express contract between the parties governing the point in controversy.⁹⁹

§ 42. Rights of removal by third persons claiming under tenant.

Persons acquiring rights to fixtures from a tenant as mortgagees, purchasers, or levying creditors, etc., have generally the same rights as to removal of the same as the tenant himself possessed.¹⁰⁰ So, the general rule obtains where there

Buller, *Nisi Prius*, 34; *Merritt v. Judd*, 14 Cal. 59; *Hanrahan v. O'Reilly*, 102 Mass. 201.

⁹⁹ *Martyr v. Bradley*, 9 Bing. 24; *Roxburghe v. Robertson*, 2 Bligh, 156; *Keogh v. Daniell*, 12 Wis. 163; *Stultz v. Dickey*, 5 Binn. (Pa.) 285, 6 Am. Dec. 411.

In *Webb v. Plummer*, 2 Barn. & Ald. 746, the court said: "Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown."

So in *Boyd v. Shorrock*, L. R. 5 Eq. 72, where a deed was made conveying certain fixed machinery, looms, and other machinery, the court said: "It is said that there is a custom in this trade that all these looms are regarded as not being fixtures, and I am asked to give credit to the evidence upon the subject. No such custom, however, I apprehend, can be produced in evidence to alter the meaning of the words of the deed, those words being that the mill shall be assigned, with all its machinery, fixed and movable. It appears to me that the parties must be bound by what has been done, and if I come to the conclusion that they have fixed those things for the term, and have treated them as so fixed, and not as things to be transported from one place to another, the case is at an end."

¹⁰⁰ *Higgins v. Riddell*, 12 Wis. 587; *Fitzgerald v. Anderson*, 81

is an express agreement between landlord and tenant governing their rights to fixtures.¹⁰¹ Chattel mortgagees of tenant's fixtures stand in no better position towards the landlord than the tenant, and, to maintain their right to remove, they must exercise it before the expiration of the tenancy;¹⁰² so, as to levying creditors¹⁰³ and purchasers of tenant's fixtures.¹⁰⁴ But it seems that the tenant, by a voluntary sur-

Wis. 341, 51 N. W. 554; *Lanphere v. Lowe*, 3 Neb. 131; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Deering v. Ladd*, 22 Fed. 575. See ante, c. 5, § 29i, "Lessors of Land," and note 56.

¹⁰¹ *Keefe v. Furlong*, 96 Wis. 219, 70 N. W. 1110.

¹⁰² In *Smith v. Park*, 31 Minn. 70, 16 N. W. 490, where a lessee, during his term, executed a chattel mortgage on a frame building upon leased premises to a third person, who, after the lease expired, brought replevin against the landlord, the court held that the mortgagee's right to remove the building was lost, and said: "The plaintiff stands in no better position than did Burgess [tenant]. His right to the property, as against the landlord's, is only such as the tenant under whom he claims had. It was for him to see to it that the building was removed within the time which, by the law and the terms of the contract, was given to the tenant for such a purpose."

So, in *Free v. Stuart*, 39 Neb. 220, 57 N. W. 991, a chattel mortgagee of a building could not remove the same after the tenant's right of removal expired.

So, in *Fuller v. Brownell*, 48 Neb. 145, 67 N. W. 6, chattel mortgagees of a portable engine and boiler—trade fixtures—were not permitted to remove the same after the tenant's term ceased.

¹⁰³ In *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83, it was held that a creditor, by the levy of an execution upon a tenant's fixtures, acquired no greater rights in or to remove the same than the tenant had.

¹⁰⁴ In *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554, where a tenant erected a frame dwelling house, 16x20, and afterwards abandoned the premises, and sold the building to the plaintiff, Fitzgerald, it was held that the purchaser, Fitzgerald, could not remove the building after the surrender of the possession of the premises by

render of the lease to his landlord, cannot defeat the previously acquired rights of persons claiming under him as vendees, mortgagees, etc.¹⁰⁵

§ 43. Rights of removal by third persons claiming under the lessor.

The right to fixtures as between the lessee and third parties claiming through purchase or mortgage from the lessor more particularly arises where there is an express agreement

the tenant, as against the landlord, in the absence of any agreement giving the right.

So, in *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187, purchasers at a foreclosure sale under a chattel mortgage of tenant's fixtures, consisting of shelves, mirrors, etc., were held not entitled to the same after the term of the tenant had expired.

¹⁰⁵ In the case of *London & Westminster Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 798, where a lessee mortgaged his tenant's fixtures, and afterwards voluntarily surrendered his lease to the lessor, who granted a fresh term to another tenant, the court held that the mortgagee had the right to enter and sever the fixtures, on the ground that the tenant could not defeat his grant by a subsequent voluntary surrender. The court said: "The question in this case is whether, if a lessee mortgages tenants' fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them. The principles of law applicable to this point are well settled; the difficulty lies in the application of them. * * * The question is thus reduced to the inquiry whether the mortgagee's right to sever the fixtures from the freehold is a 'right or interest,' within the meaning of this rule of law, and we are of opinion that it is. * * * We think that it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender."

Ombony v. Jones, 19 N. Y. 234; *Adams v. Goddard*, 48 Me. 212; *Baker v. Pratt*, 15 Ill. 571; *McKenzie v. City of Lexington*, 4 Dana (Ky.) 129. See, also, *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Thropp's Appeal*, 70 Pa. 395.

between landlord and tenant stipulating as to their respective rights, or in cases of tenant's fixtures. The effect of an express agreement between the immediate parties upon third parties has been fully discussed in a preceding chapter.¹⁰⁶ Generally, a third party who is *bona fide* and without notice, claiming under a landlord as a mortgagee or grantee of the realty, takes with the demised premises all those chattels so annexed thereto as to become, under the ordinary tests of a fixture, a part thereof.¹⁰⁷ Thus, trade fixtures, if considered as a part of the freehold while annexed, would pass with the realty under the rule announced. The rights of parties in this connection have been the subject of much discussion. No rule of universal application obtains. The rights of the parties vary in accordance with the particular relation and circumstances.

— (a) **Prior mortgagees of the realty.**

As to tenant's fixtures, where there is an existing mortgage on the leased premises prior to the annexation of the fixture, the tenant has the same rights of removal against the mortgagee as against the landlord.¹⁰⁸

— (b) **Subsequent vendees and mortgagees of the realty.**

But as against subsequent vendees and mortgagees of the lessor who are *bona fide* and without notice of the tenant's rights the rule is stated that the tenant has no right to re-

¹⁰⁶ See *supra*, c. 5, "Agreements as to the Character of Fixtures."

¹⁰⁷ *Jones v. Cooley*, 106 Iowa, 165; *Joliet First Nat. Bank v. Adam*, 138 Ill. 483; *Davis v. Buffum*, 51 Me. 160.

¹⁰⁸ *Ferris v. Quimby*, 41 Mich. 202; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138.

move his tenant's fixtures.¹⁰⁹ This rule is based upon the idea that a tenant's fixtures are a part of the realty until severed; and in a contest between a *bona fide* mortgagee or vendee of the lessor and the lessee, the equities of the parties are at least equal, and the legal rights of the vendee or mortgagee are superior.¹¹⁰ In New York, however, the necessity of notice is apparently eliminated, and a subsequent vendee or mortgagee stands in the shoes of the lessor or grantor.¹¹¹ As to what constitutes notice, mere possession of the leased premises by the tenant is not sufficient.¹¹² The third party may have notice, by knowledge of the lease, of the claims of the tenant, or, in Illinois, by the recording of a chattel mortgage upon the fixtures.¹¹³

¹⁰⁹ *Landon v. Platt*, 34 Conn. 517; *Davis v. Buffum*, 51 Me. 160; *Wing v. Gray*, 36 Vt. 261; *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652. In *Smyth v. Stoddard*, 203 Ill. 424, barn and a crib erected by the tenant on the leased premises passed as a part of the realty to a subsequent bona fide vendee of the same, irrespective of an agreement on the part of the landlord giving the right of removal.

¹¹⁰ *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *Landon v. Platt*, 34 Conn. 517.

¹¹¹ In *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, where a lessee, having placed machinery upon the leased premises, purchased the premises under a provision in the lease so permitting, and where there was a mortgage on the premises executed by the original lessor subsequent to the lease, it was held that the lessee had the right to remove the machinery. The court said: "The defendant, who has derived title to the real estate under a mortgage executed by the lessor subsequent to the lease, and while the tenancy was subsisting, occupies the position of the lessor."

¹¹² *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Powers v. Denison*, 30 Vt. 752.

¹¹³ In *Bartlett v. Haviland*, 92 Mich. 552, 52 N. W. 1008; *Roth v. Collins*, 109 Iowa, 501, 80 N. W. 543.

Where a fixture was the property of the tenant, and he had a right
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(c) Subsequent lessees.

As between a lessee of the demised premises and a subsequent lessee of the same, without notice, chattels so annexed as to ordinarily be a part thereof cannot be removed by the former, irrespective of an existing agreement between the lessor and the lessee granting the right of removal.¹¹⁴

(d) Purchasers at an execution or judicial sale.

Purchasers at an execution or other judicial sale apparently stand in the shoes of the original debtor, and hence are subject to whatever rights the tenant possessed against the debtor, his original landlord.¹¹⁵

to remove it, a purchaser of the premises was not entitled to it, as against the tenant, if he had notice of the tenant's rights before he paid the price. *Jones v. Cooley*, 106 Iowa, 165, 76 N. W. 652.

Where a grantee of land is aware that fixtures have been annexed by a lessee then in possession, he acquires no rights by conveyance to prevent the removal of them by the lessee before the expiration of the lease. *Davis v. Buffum*, 51 Me. 160.

¹¹⁴ Where a lessee of hotel property built a wooden platform on piles driven into the ground, and nailed it to the hotel building in such a manner as to ordinarily become a part of the realty, but under an agreement with the landlord giving the right of removal when he went out of possession, it was held that the platform could not be removed as against a subsequent lessee, without notice, who had gone into possession. *Trask v. Little*, 182 Mass. 8, 64 N. E. 206.

¹¹⁵ See ante, c. 5, § 29c, "Purchasers at an Execution Sale," and notes 45, 46.

CHAPTER VII.

FIXTURES AS BETWEEN GRANTOR AND GRANTEE.

- § 44. General rule.
- 45. Relation of the parties.
- 46. Time of annexation.
- 47. Tenant's fixtures.
- 48. The tests.
- 49. Machinery.
- 50. Buildings.
- 51. House fixtures.
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- 53. Gas fixtures.
- 54. Farm fixtures.
- 55. As affected by agreement of the parties.
 - (a) Provisions in a deed.
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 - (c) Parol reservation.
- 56. As affected by custom.
- 57. As affecting third persons claiming under grantor or grantee.
 - (a) As between a conditional vendor or a chattel mortgagee of fixtures and a grantee of the realty.
 - (b) As between a lessor or licensee and a grantee of the realty.
 - (c) Want of unity of title.

§ 44. General rule.

As between grantor and grantee, the strict rule of the common law obtains, and the general rule, in the absence of any agreement between the parties to the contrary, undoubtedly is that all fixtures,¹ whether actually or constructively an-

¹ The word "fixtures," in this connection, is used in the sense that
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nexed to the realty, pass by a conveyance of the freehold.² As between these parties, there is a stricter observance of old common-law principles as to fixtures, and the courts have shown an unwillingness to extend the exceptions to the general rule granted to tenants in cases of fixtures between landlord and tenant. In this respect there is an apparently good reason why the courts should maintain that attitude; for the grantor, before the conveyance of his freehold, is the owner of all his fixtures, as well as the realty to which they are attached. He knows what the law is, and it is in his power to make his fixtures personalty before sale of the premises, either by a severance or by an agreement in the instrument of conveyance duly reserving them to himself.³

§ 45. Relation of the parties.

The general rule just announced applies not only to those parties occupying the strict relation of grantor and grantee, but equally as well to a vendee in possession under a con-

it applies to those annexed articles which are so attached to the realty as to become a part thereof. *

² In *Conner v. Coffin*, 22 N. H. 538, the court said: "As between grantor and grantee, the law is more favorable for the grantee than it is for a tenant. Between them, the strict rule of the common law still prevails, and the grantee holds all fixtures, whether for trade and manufacture, or for the purposes of agriculture or habitation."

As between vendor and vendee of the inheritance in freehold estates, all fixtures pass to the vendee. *Preston v. Briggs*, 16 Vt. 124; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 362; *Davis v. Buffum*, 51 Me. 160; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Day v. Perkins*, 2 Sandf. Ch. (N. Y.) 359; *Latham v. Blakely*, 70 N. C. 368; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Kruger v. Le Blanc*, 75 Mich. 424.

³ *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456.

tract to convey, or under a bond for a deed;⁴ so, to a vendee holding under a parol agreement to convey;⁵ likewise, to

⁴ Erections made by one occupying land under a bond for a deed are to be regarded as real estate, and are not removable by the occupant as personal property. *Hemenway v. Cutler*, 51 Me. 407.

So, a meeting house built on land held by the occupant under a bond for a deed is a part of the realty. *Poor v. Oakman*, 104 Mass. 309.

If fixtures are added to real estate by one who is in possession thereof under a bond for a deed without paying rent, his right to remove them after a breach of the bond must be determined by the rule which prevails as between vendor and purchaser, and not that which prevails as between landlord and tenant. *McLaughlin v. Nash*, 14 Allen (Mass.) 136.

So, a dwelling house erected by a purchaser under a contract to purchase is a part of the realty. *Ogden v. Stock*, 34 Ill. 522. When one in possession of land under a contract of purchase voluntarily erects and moves buildings thereon without any agreement, express or implied, with the landowner, that they shall not become part of the realty, they become part of the realty, and belong to the landowner. *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. 442; *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035. See, also, *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57; *King v. Johnson*, 7 Gray (Mass.) 239; *Milton v. Colby*, 5 Metc. (Mass.) 78; *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Murphy v. Marland*, 8 Cush. (Mass.) 575; *English v. Foote*, 8 Smedes & M. (Miss.) 444; *Perkins v. Swank*, 43 Miss. 349; *Smith v. Altick*, 24 Ohio St. 369; *Tabor v. Robinson*, 36 Barb. (N. Y.) 483; *Smith v. Moore*, 26 Ill. 392; *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *Lapham v. Norton*, 71 Me. 83; *Taylor v. Collins*, 51 Wis. 123; *Little v. Willford*, 31 Minn. 178; *Seatoff v. Anderson*, 28 Wis. 212; *Moore v. Vallentine*, 77 N. C. 188; *Miller v. Waddingham* (Cal.; 1891) 25 Pac. 688; *Hannibal & St. J. R. Co. v. Crawford*, 68 Mo. 80;

⁵ *Hutchins v. Shaw*, 6 Cush. (Mass.) 58; *Christian v. Dripps*, 28 Pa. 271; *English v. Foote*, 8 Smedes & M. (Miss.) 444. *Contra*, *Pullen v. Bell*, 40 Me. 314; *Russell v. Richards*, 10 Me. 429.

execution purchasers of the real estate, etc.⁶ The fact that the conveyance is by virtue of legal process, instead of mutual agreement of the parties, does not alter the application of the rule.⁷

§ 46. Time of annexation.

Chattels annexed by a grantor after a conveyance by absolute deed pass to the grantee, as well as prior annexed articles.⁸ And the same rule obtains where fixtures are erected

Westgate v. Wixon, 128 Mass. 304. But where the contract of purchase is abrogated by the default of the grantor, and through no fault on the part of the grantee, the rule does not apply, and a right of removal exists in favor of the grantee. Board Com'rs of Rush County v. Stubbs, 25 Kan. 322; Hinkley & Egery Iron Co. v. Black, 70 Me. 473, 35 Am. Rep. 346; Lapham v. Norton, 71 Me. 83; Waters v. Reuber, 16 Neb. 106.

⁶ Engine held a part of the realty upon levy. Farrar v. Chauffetete, 5 Denio (N. Y.) 529; Moore v. Smith, 24 Ill. 512. So, a clapboard machine and shingle machine fastened to the floor. Trull v. Fuller, 28 Me. 545. So, fixed machinery in a mill. Payne v. Farmers' & Citizens' Bank, 29 Conn. 415. So, a marine railway. Strickland v. Parker, 54 Me. 263. See, also, Oves v. Ogelsby, 7 Watts (Pa.) 106; Symonds v. Harris, 51 Me. 14; Boyle v. Swanson, 6 La. Ann. 263; Johnson v. Mehaffey, 43 Pa. 308.

⁷ Powell v. Monson & Brimfield Mfg. Co., 3 Mason, 459, Fed. Cas. No. 11,357; Tyler v. Decker, 10 Cal. 435; Price v. Brayton, 19 Iowa, 309; Stillman v. Flenniken, 58 Iowa, 450, 43 Am. Rep. 120; Kirwan v. Latour, 1 Har. & J. (Md.) 289, 2 Am. Dec. 519; Trull v. Fuller, 28 Me. 545; Strickland v. Parker, 54 Me. 263; Hemenway v. Cutler, 51 Me. 407; Parsons v. Copeland, 38 Me. 537; Goddard v. Chase, 7 Mass. 432; Latham v. Blakely, 70 N. C. 368; Baker v. Davis, 19 N. H. 325; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Willis v. Morris, 66 Tex. 628, 59 Am. Rep. 634; Farrar v. Chauffetete, 5 Denio (N. Y.) 527; Weaver v. Morris, 1 Del. Co. R. (Pa.) 230.

⁸ Kruger v. Le Blanc, 75 Mich. 424, 42 N. W. 853.

upon land by a debtor under execution, and before execution of the sheriff's deed to the purchaser.⁹

§ 47. Tenant's fixtures.

The fact that articles attached to the premises have been devoted to purposes of trade, domestic convenience, or ornament does not thereby entitle the grantor to remove the same. The exception to the general rule in favor of this class of fixtures is not operative as between grantor and grantee.¹⁰

§ 48. The tests.

In ascertaining what articles pass with a conveyance of the real estate, the ordinary tests of a fixture, such as have been discussed in a previous chapter, are applicable and determinative.¹¹ Whether an article shall be deemed a part of the realty or personalty, as between grantor and grantee, is made to depend upon the character of the chattel itself, the fact of annexation, its adaptability to the use of the freehold, the purpose to which it is devoted, and the intention of the parties relative thereto. The principles of these tests have been reviewed in another portion of this work, and it is not necessary to consider them here beyond showing their application to specific chattels that have been annexed to

⁹ *Hayes v. New York Gold Min. Co.*, 2 Colo. 273.

¹⁰ *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Day v. Perkins*, 2 Sandf. Ch. (N. Y.) 359; *Potter v. Cromwell*, 40 N. Y. 287; *McGreary v. Osborne*, 9 Cal. 119. "As against him [the vendor], all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance." *Sands v. Pfeiffer*, 10 Cal. 260.

¹¹ See chapter 3, *supra*, "The Tests and Requisites of a Fixture."

the freehold, for the purpose of exemplifying the rule of law as between grantor and grantee.

§ 49. Machinery.

Articles of machinery in mills, manufacturing plants, and other buildings, and upon farms, which are actually or constructively annexed to the realty, or to a building or erection that is a part thereof, have been generally considered to pass with a conveyance of the land to the grantee.¹² The mode of annexation, the adaptability and the purpose of the machinery, and the intention of the parties are important factors in ascertaining whether the machinery is a part of the freehold. Ordinarily there must exist some sort of annexation of the machine or machinery in order to make it a part of the realty; not necessarily physical annexation, but an actual or constructive annexation that shows an adaptability, purpose, and intention to permanently use the article in connection with the freehold.¹³ Mere loose machinery

¹² *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Gary v. Burguières*, 12 La. Ann. 227; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *McRea v. Central Nat. Bank*, 66 N. Y. 490. See, also, notes following, 15-19.

¹³ In *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489, *Rapallo, J.*, said: "As between vendor and vendee, the mode of annexation is not the controlling test. The purpose of the annexation, and the intent with which it was made, is, in such cases, the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached, as upon the motive and intention of the party in attaching it. * * * The mode of annexation, may, it is true, in the absence of other proof of intent, be controlling. It may be, in itself, so inseparable and permanent as to render the article necessarily a part of the realty, and, in case of less thorough annexa-

does not pass by conveyance unless an essential or integral part of some other machine or mechanism.¹⁴ As to heavy machinery, such as engines, boilers, waterwheels, and gearing, used to furnish the motive power for a factory, mill, or other building, the general rule is, in accordance with the weight of authority, that such machinery is a part of the realty as between grantor and grantee.¹⁵ Machinery of this

tion, the mode of attachment may afford convincing evidence that the intention was that the attachment should be permanent."

¹⁴ Loose or portable articles of personal property, consisting of a tool box, sand box, wheelbarrows, planks, oil tank and contents, crowbars, and shovels, connected with a plant for manufacturing paving brick, are not fixtures merely because they are used in connection with the plant, and are necessary to its effective operation, it appearing that they have no peculiar or special adaptation to this particular plant, and that they are capable of a like use elsewhere. *Hillebrand v. Nelson* (Neb.; 1901) 95 N. W. 1068.

"Loose, movable machinery, not attached nor affixed, even where it is used in prosecuting any business to which the freehold property is adapted, is not to be regarded as part of the real estate, or as an appurtenance to it." *Parker, C. J., in Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

¹⁵ In *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, Chief Justice Shaw said: "In general terms, we think it may be said that when a building is erected as a mill [or other manufactory], and the water works or steam works, which are relied upon to move the mill, are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, * * * are yet parts of it, and pass with it by a conveyance, mortgage, or attachment."

In *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742, the court said: "It is settled by the adjudicated cases, as part of the common law of America, that, as between vendor and vendee, the stationary machinery by which turning lathes, or any of those machines which are portable and of equal use everywhere, are impelled, must be regarded as irremovable fixtures, and part of the freehold, whenever such stationary machinery shall have been erected on the land by
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character is generally solidly affixed to foundations built for the purpose, and is either physically annexed to the freehold,

the vendor himself during his ownership, for his own use, and fixed in or to the ground, or to some substance already become a part of the freehold, whether erected for the purpose of trade or agriculture; and that such stationary machinery passes by the deed of the vendor to the vendee, conveying the land on which it stands."

An engine, boilers, and fire grates, fastened to a foundation which is let into the ground, are a part of the freehold. *Sands v. Pfeiffer*, 10 Cal. 260.

A steam engine and boilers pass to a grantee, even though wrongfully attached to the freehold by the grantor, who had leased the same. *Fryatt v. Sullivan Co.*, 5 Hill (N. Y.) 116.

The main belt of a steam marble mill, connecting the drive wheel with the main shafting, and furnishing the motive power, is a part of the real estate. *Friedly v. Giddings*, 119 Fed. 438.

An engine, placed in the basement of a building to furnish power to tenants, and fastened by bolts imbedded in a foundation of stone and cement laid in the basement floor for that purpose, passes with a conveyance of the real estate, though at the time of the sale the engine was not in use, being disconnected from its boiler, and another engine furnished by one of the tenants being used instead. *Tolles v. Winton*, 63 Conn. 440, 28 Atl. 542.

A steam engine and boiler situated in a shed attached to a two-story building used as a mill, the shed being planked up all around, so that the engine and boiler could not be removed without taking away the planks, pass under a deed of the land. *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373, 18 Am. St. Rep. 903.

A lead-smelting engine, resting on a framework of timbers bolted together, and partly sunk into the ground, and connected with a line of shafting firmly attached to upright studding, with a boiler resting on iron posts, which stood on stonework let into the ground, and with brickwork inclosing it half way up to keep in the heat, passes with a deed of trust of the land on which it stood. *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756.

A steam engine in a tannery, used to break bark, passes by a conveyance of the freehold. *Oves v. Ogelsby*, 7 Watts (Pa.) 106.

A steam engine weighing five tons, which could not be removed

or held in place, equally well, by the force of gravity. But where machinery used for the motive power is so attached to the freehold as to show an apparent intention not to make it a part thereof, it is personalty.¹⁶ Shafting and belting

without taking down part of the building, but not attached to any fastening, is a part of the realty. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

A water wheel and gearing placed in a mill for permanent use in operating the same is a part of the realty, and passes by grant to the grantee. *Lapham v. Norton*, 71 Me. 83. See, also, *Davenport v. Shants*, 43 Vt. 546; *Keeler v. Keeler*, 31 N. J. Eq. 181.

So, a steam engine and boiler standing on wheels six inches in diameter, and not otherwise fastened to the ground or building, are a part of the realty. *Hart v. Sheldon*, 34 Hun (N. Y.) 38.

See *Fisk v. People's Nat. Bank*, 14 Colo. App. 21, 59 Pac. 63; *Otis v. May*, 30 Ill. App. 581; *Jenney v. Jackson*, 6 Ill. App. 32; *Kloess v. Katt*, 40 Ill. App. 99; *Pea v. Pea*, 35 Ind. 387; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *New Orleans Canal & Banking Co. v. Leeds*, 49 La. Ann. 123; *McKim v. Mason*, 3 Md. Ch. 186; *Scheifele v. Schmitz*, 42 N. J. Eq. 700; *Doughty v. Owen* (N. J. Ch.; 1890) 19 Atl. 540; *Teaff v. Hewitt*, 1 Ohio St. 538, 59 Am. Dec. 634; *Brennan v. Whitaker*, 15 Ohio St. 446; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71; *Vail v. Weaver*, 132 Pa. 363, 19 Am. St. Rep. 598; *Jones v. Bull*, 85 Tex. 136; *Frankland v. Moulton*, 5 Wis. 1; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22.

An engine with boiler and attachments securely attached to lands of the United States by the locator and occupier of a mining claim thereon is part of the real estate. *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373.

¹⁶ A sawmill built upon timbers lying upon the surface of the ground, with brickwork added on top of the timbers, to which the engine and boiler were attached, with the purpose in view of sawing timber within a convenient distance, and then removing to another locality, is personalty. *Brown v. Lillie*, 6 Nev. 244; *Tillman v. De Lacy*, 80 Ala. 103; *Vail v. Weaver*, 132 Pa. 363, 19 Am. St. Rep. 598; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527; *Randolph v. Gwynne*,

used in a factory or other manufacturing plant to connect the motive power to the rest of the machinery has also been held to come within the general rule announced as to motive power.¹⁷ As to machinery in factories, mills, and manufacturing plants, other than that used for furnishing or transmitting the motive power, the decisions are not entirely in accord, although the general holding apparently is that such machinery passes by conveyance. The question is made to turn largely upon the mode of annexation, and the adaptability and use of the machinery. Thus, this class of machinery in cotton and woolen factories, saw mills, machine shops, and other manufacturing plants is uniformly held a part of the realty between grantor and grantee, as may be noted from the accompanying citations.¹⁸ So, machinery upon farms and other lands has generally been held a part of the realty.¹⁹

7 N. J. Eq. 88; Padgett v. Cleveland, 33 S. C. 339; Crane v. Brigham, 11 N. J. Eq. 29.

¹⁷ Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Cunningham v. Cureton, 96 Ga. 489; Bowen v. Wood, 35 Ind. 268; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Corliss v. McLagin, 29 Me. 115; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Burnside v. Twitchell, 43 N. H. 395; Allison v. McCune, 15 Ohio, 726; Quinby v. Manhattan Cloth & Paper Co., 24 N. J. Eq. 260; Farrar v. Chauffetete, 5 Denio (N. Y.) 527; Roberts v. Dauphin Deposit Bank, 19 Pa. 71; Keeler v. Keeler, 31 N. J. Eq. 181; Lee v. Hub-schmidt Bldg. & Wood-Working Co., 55 N. J. Eq. 623; Scheifele v. Schmitz, 42 N. J. Eq. 700; Hill v. Wentworth, 28 Vt. 428; Harris v. Haynes, 34 Vt. 220.

¹⁸ Machinery in cotton or woolen mills: Looms, belts, jacks, etc., in a woolen factory are a part of the realty. Parsons v. Copeland, 38 Me. 537. A carding machine in a woolen mill, fastened by its weight alone, passes with a conveyance. Deal v. Palmer, 72 N. C. 582. Machinery of a cotton or woolen mill passes with a conveyance. Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612; Ottumwa

§ 50. Buildings.

Buildings ordinarily have been treated as a part of the realty.²⁰

Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; *Cavis v. Beckford*, 62 N. H. 229, 13 Am. St. Rep. 554. So, spinning machines in a woolen factory. *Ex parte Makepeace*, 9 Ired. (31 N. C.) 91. See *McKim v. Mason*, 3 Md. Ch. 186; *Gaylor v. Harding*, 37 Conn. 508; *Graves v. Pierce*, 53 Mo. 429; *Cavis v. Beckford*, 62 N. H. 229; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235. Contra: Looms in a woolen factory, with the motive power furnished by leathern bands, and not otherwise annexed to the building than by screws holding them to the floor, which kept them steady while working, and which could be removed without injury to themselves or to the building, are personal property. *Murdock v. Gifford*, 18 N. Y. 28. So, spinning frames in a cotton factory, standing on the floor, around which cleats were placed and nailed to the floor, are personalty. *Swift v. Thompson*, 9 Conn. 63, 21 Am. Dec. 718. So, carding machines in a woolen factory. *Taffe v. Warnick*, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383; *Tobias v. Francis*, 3 Vt. 425, 23 Am. Dec. 217; *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. See *Gaylor v. Harding*, 37 Conn. 508; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157; *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; *Sturgis v. Warren*, 11 Vt. 433; *Wade v. Johnston*, 25 Ga. 331.

Dye kettles in a dyeing mill, firmly set in brickwork, pass to the grantee of the realty. *Noble v. Bosworth*, 19 Pick. (Mass.) 314.

Potash kettles in an ashery, set in an arch of masonry, with a chimney set upon a platform, but not fastened to the building, are a part of the realty. *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456.

Machinery in a saw mill: Machinery necessary for the purposes of the mill, and actually or constructively annexed, passes by conveyance of the realty. *Farrar v. Stackpole*, 6 Me. 154. So, saw arbor and boxes, circular saw, feed and gig works, log rolls, and other fixtures, all attached to a frame bolted to the floor timbers. *Davenport v. Shants*, 43 Vt. 546. See *Brennan v. Whitaker*, 15 Ohio St. (254)

§ 51. House fixtures.

Fixtures in a house, such as stoves or furnaces, steam heating apparatus, water pipes, bathing tubs, doors, windows,

446; *Washington Nat. Bank of Seattle v. Smith*, 15 Wash. 160; *Clark v. Hill*, 117 N. C. 11. So in *Burnside v. Twitchell*, 43 N. H. 390, it was held that saw-mill saws and leather belting attached to the mill, and in use therein, passed by conveyance, but that saws purchased by the owner of the mill for use in the mill, which were at the time stored therein, were personalty. So, saws, belting, and machinery in a saw mill detached and removed elsewhere are personalty. *Bliss v. Misner*, 4 Thomp. & C. (N. Y.) 633. So, a saw mill built upon timbers lying upon the surface of the ground, with brickwork constructed upon those timbers, and the engine, boiler, and machinery therein attached to it, and constructed with a view to removing it elsewhere after sawing the timber within a convenient distance, was held personal property. *Brown v. Lillie*, 6 Nev. 244.

Machinery in factories: Planers and molding machines in a factory, set on a dirt floor, and attached to the real estate by bands which run on a wheel attached to a shaft which is attached to the building, are a part of the realty. *Green v. Phillips*, 26 Grat. (Va.) 752. Machinery used in a sash, door, and blind factory, and attached to the building by screws and bolts, is a part of the realty, as between grantor and grantee. *Langdon v. Buchanan*, 62 N. H. 657.

Machinery in a flour or grist mill ordinarily passes by conveyance. *Reg. v. Wheeler*, 6 Mod. 187; *Walmsley v. Milne*, 7 C. B. (N. S.) 115, 8 Am. Law Reg. 373; *Phoenix Mills v. Miller*, 62 Hun, 621, 17 N. Y. Supp. 158; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570. Portable grist mill is a part of the realty. *Potter v. Cromwell*, 40 N. Y. 287; *McGreary v. Osborne*, 9 Cal. 119.

Machinery and apparatus in a slaughter house are a part of the realty. *Kloess v. Katt*, 40 Ill. App. 99.

Electric-light plant and machinery: In *Fechet v. Drake* (Ariz.; 1887) 12 Pac. 694, the machinery in an electric-light plant, as well as the wires conveying the current, even though not situate upon the premises, were held a part of the realty. But see *Vail v. Weaver*, 132 Pa. 363, 19 Am. St. Rep. 598, where an engine, dynamo, and

blinds, etc., have generally been treated as a part of the realty.²¹

other appliances of an electric-light plant were held a part of the realty, though physically annexed.

Machinery in a shoe factory, attached to the floor by benches and large screws, passes by conveyance. *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166.

Machinery in a twine factory, fastened to the floor by bolts, nails, or cleats, and attached to the gearing, is a part of the realty. *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489.

Machinery in a paper mill passes with conveyance. *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *Hill v. Farmers' & Mechanics' Nat. Bank*, 97 U. S. 450; *Bowen v. Wood*, 35 Ind. 268; *Lathrop v. Blake*, 23 N. H. 46.

A brick press, weighing five and a quarter tons, annexed to a brick foundation, is a part of the realty. *Simpson Brick Press Co. v. Wormley*, 61 Ill. App. 460.

So, a paper cutter and a printing press. *Otis v. May*, 30 Ill. App. 581.

Machinery in a machine shop, foundry, or iron mill: Vises, lathes, pulley, belts, and shafting in a foundry pass by conveyance. *Foote v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411. The rolls of an iron rolling mill, as well as the iron plates with which the floor of the mill is covered, being indispensable parts of it, are part of the realty. *Pyle v. Pennock*, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490. See, also, *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249; *Roddy v. Brick*, 42 N. J. Eq. 218; *Lackas v. Bahl*, 43 Wis. 53; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310.

Machinery in a mine or quarry: In *Ege v. Kille*, 84 Pa. 333, all machinery of an ore bank, whether fast or loose, which was necessary to constitute it such, and without which it would not be an ore bank equipped and ready for use, was held to pass by conveyance of the realty. In the sale of a slate quarry, the cutting and polishing benches, derrick boom, steam pump, etc., were held to be a part of the realty. Physical annexation is not the test. The question is whether the articles were suitable, proper, and necessary for the purpose of carrying on the business of mining and manufacturing. *Williams' Appeal*, 24 W. N. C. (Pa.) 365, 16 Atl. 810. So, fixtures in (256)

§ 52. Store fixtures.

Counters, shelves, partitions, awnings, etc., in a store or other public place have been held a part of the realty.²²

a stone quarry. *Speiden v. Parker*, 46 N. J. Eq. 292. Likewise, drum hoisting works in a mine. *Dutro v. Kennedy*, 9 Mont. 101.

¹⁹ A cotton gin in a gin house, not fastened to the floor in any way, the front ledge of which rested against a plank nailed to the floor to prevent its moving when the band was applied, this being the usual mode of securing the gin in place, was held to pass by conveyance of the freehold. *Latham v. Blakely*, 70 N. C. 368; *Bratton v. Clawson*, 2 Strob. (S. C.) 478. So, a cotton gin fixed upon a cotton plantation in the usual way. *Tate v. Blackburne*, 48 Miss. 1. So, a cotton gin fastened to the building by nails and braces. *Degraffenreid v. Scruggs*, 4 Humph. (23 Tenn.) 451, 40 Am. Dec. 658; *Bond v. Coke*, 71 N. C. 97; *Fairis v. Walker*, 1 Bailey (S. C.) 540. A cotton press fastened to the freehold by being let into notches in the sills, and secured by wedges, is a part of the realty. *Tate v. Blackburne*, 48 Miss. 1. See, also, *Bond v. Coke*, 71 N. C. 97; *Jones v. Bull*, 85 Tex. 136. So, the running gear of a cotton gin. *Smith v. Odom*, 63 Ga. 499. But in *Cole v. Roach*, 37 Tex. 413, a gin stand not attached to the realty, though used for the purposes of the farm, was held not to pass by an ordinary conveyance of the farm. See, also, *Jones v. Bull*, 85 Tex. 136; *McJunkin v. Dupree*, 44 Tex. 500; *Gresham v. Taylor*, 51 Ala. 505. So, in *Hancock v. Jordan*, 7 Ala. 448, 42 Am. Dec. 600, a gin head, though attached to the gin house by a brace, does not pass by conveyance of the ground on which it stands. But a hop press not attached to the frame of a building, but placed in a room just high enough to receive it, and capable of removal without material injury to the building, is personalty. *Sherrick v. Cotter*, 28 Wash. 25, 68 Pac. 172.

A stone mill for crushing stone, consisting of machinery solidly imbedded in stone, is a part of the realty. *Davis v. Mugan*, 56 Mo. App. 311.

A steam saw mill put upon land for the purpose of sawing timber thereon, with its foundation planted in the ground, and its machinery attached by bolts, belts, etc., to the framework, is a part of

§ 53. Gas fixtures.

Gas chandeliers and gas burners screwed on the ends of gas pipes have been uniformly held to be personalty, even the freehold. *Treadway v. Sharon*, 7 Nev. 37. But see *Brown v. Lillie*, 6 Nev. 244.

Where land is sold and conveyed, having situate upon and attached to it a steam saw mill and machinery, the same passes by conveyance to the grantee. *Pea v. Pea*, 35 Ind. 387; *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903. But see *Long v. Cockern*, 128 Ill. 30, where a portable engine and saw mill, the saw mill being set upon sills attached to stakes driven into the ground, and made stationary, and the engine sunk into the ground, with a shed built over it, were held not to pass to the vendee.

A sugar mill built upon a plantation is a part of the realty. *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

A portable grist mill, consisting of a heavy frame of timber, containing the mill stones, and fastened to timbers lying on the floor of the building by bolts, nuts, and washers, passes by grant to the vendee. *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485.

A cider mill, though temporarily severed from the barn to which it was attached for convenience in making repairs, passes by a conveyance of the freehold. *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780. So, a large copper kettle, used for cooking food for hogs, and incased in brick and mortar work. *Bryan v. Lawrence*, 5 Jones (50 N. C.) 337.

Stills and appliances for distillery purposes, incased in brick and mortar work, are a part of the realty. *Bryan v. Lawrence*, 5 Jones (50 N. C.) 337; *McClintock v. Graham*, 3 McCord (S. C.) 553; *Campbell v. O'Neill*, 64 Pa. 290.

Dye kettles in a dye house, firmly secured in brickwork, pass by deed of the land. *Union Bank v. Emerson*, 15 Mass. 159; *Noble v. Bosworth*, 19 Pick. (Mass.) 314. But see, contra, *Hunt v. Mullanphy*, 1 Mo. 508, where the kettle was built into a furnace with brick and mortar.

²⁰ A barn built of wood, resting on a stone underpinning, passes by conveyance of the land to the grantee. *Preston v. Briggs*, 16 Vt. 124; *Leland v. Gassett*, 17 Vt. 403. So, a barn resting on four large stones, two-thirds of the same only being on the land conveyed, is a
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as between vendor and vendee, on the ground that they are removable without injury to the premises, and are merely substitutes for lamps and chandeliers, which were always

part of the realty. *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93. A house is a part of the freehold. *Dooley v. Crist*, 25 Ill. 551; *Salter v. Sample*, 71 Ill. 430. So, a store house. *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483. But a small frame building, of the value of \$25, set upon blocks resting on the ground, and erected by a pre-emptioner upon land of the United States, did not pass by a patent as a part of the realty, for the assigned reason that there was no annexation to the soil. *Pennybecker v. McDougal*, 48 Cal. 160.

²¹ **Stoves:** Iron stoves, fixed to the brickwork of chimneys, and not removable without injury to the premises, are a part of the realty. *Goddard v. Chase*, 7 Mass. 432; *Smith v. Heiskell*, 1 Cranch, C. C. 99, Fed. Cas. No. 13,056. An air-tight stove, standing in place for use in a house, passes by conveyance, but not stoves stored away for the summer. *Blethen v. Towle*, 40 Me. 310. So, a Franklin stove, fitted, adapted, and designed for the use of the house in question, passes by conveyance. *Folsom v. Moore*, 19 Me. 252. But ordinarily, stoves put up in such a manner that they can be removed and replaced, or others substituted at pleasure, are not a part of the real estate. *Freeland v. Southworth*, 24 Wend. (N. Y.) 191; *Williams v. Bailey*, 3 Dane Abr. 152. So, a cooking range, fastened to the floor of a hotel, is not a fixture that passes on sale of the hotel. *John Van Range Co. v. Allen (Miss.)* 7 So. 499. A kitchen range in a hotel, resting on a foundation of brick, and annexed to the building by pipes, passes by conveyance. *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251. But not a Baltimore heater. *Harmony Bldg. Ass'n v. Berger*, 99 Pa. 320.

Furnaces: Portable hot-air furnaces, used for warming a dwelling house, set in pits prepared for them in the cellar, and kept in place by their own weight, are a part of the realty. *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393. Furnaces placed in the cellar of a house, upon a row of bricks set in a circle, with pipes fastened to the ceiling of the cellar, and connecting with the chimney and registers of the house, pass by a conveyance. *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714. But a portable hot-air furnace, resting by its own weight upon the ground, and connected

considered personalty;²³ so, a gas stove and gasometer;²⁴ but gas pipes are a part of the realty.²⁵

to the house by hot-air pipes and registers in the usual manner, is not a part of the realty. *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. Generally, furnaces intimately connected with a house or other building are a part of the realty. *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Thielman v. Carr*, 75 Ill. 385; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273; *Pratt v. Baker*, 92 Hun (N. Y.) 331; *Allen v. Mooney*, 130 Mass. 155.

Steam-heating apparatus: *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257; *Tyler v. White*, 68 Mo. App. 607; *Keeler v. Keeler*, 31 N. J. Eq. 181. Contra, *National Bank of Catasaquua v. North*, 160 Pa. 311. See *President of Insurance Co. v. Buckstaff* (Neb.; 1902) 92 N. W. 754.

Bathing tub and lead pipes fastened to the floor and walls of a building with nails are a part of the realty. *Cohen v. Kyler*, 27 Mo. 122.

Wooden cistern and portable cupboards are a part of the realty. *Blethen v. Towle*, 40 Me. 310; *Cole v. Roach*, 37 Tex. 413. So, bookcases fastened to the floor and wall, and a hat rack built into the room. *Columbia Ins. Co. v. Kneisley*, 13 Wkly. Law Bul. 437, 9 Ohio Dec. 432.

Doors and locks are a part of the realty. *Pettengill v. Evans*, 5 N. H. 54. So, blinds and storm windows. *Colegrave v. Santos*, 2 Barn. & C. 76; *Pettengill v. Evans*, 5 N. H. 54; *State v. Elliot*, 11 N. H. 540. But where double windows were made for a house, and had been stored away by the grantor, so that the grantee might not know of their existence, it was held that they did not pass by the conveyance of the realty. *Peck v. Batchelder*, 40 Vt. 233. See, also, *Towne v. Fiske*, 127 Mass. 125; *Fratt v. Whittier*, 58 Cal. 126.

Articles in a house held not a part of the realty: Marble and imitation marble slabs placed by the owner in a house belonging to him after its completion, and resting upon, but not fastened to, brackets screwed into the walls, are a part of the furniture of the house, and do not pass to the vendee of the realty. *Weston v. Weston*, 102 Mass. 514; *Ex parte Morrow*, 1 Low. 386, Fed. Cas. No. 9,850. So, carpets and curtain rods. *Manning v. Ogden*, 70 Hun (N. Y.) 399. So, movable china closets and movable screens. *Lea v. Shakespears*,

§ 54. Farm fixtures.

Articles on a farm, such as fence rails, hop poles, nursery trees, manure, and growing grain, have been held to pass by a conveyance of the land.²⁶

10 Montg. Co. Law Rep'r (Pa.) 171. So, a playhouse built of boards by the child of the vendor and other children, nailed together and to the fence, and owned jointly by the children. *Kirchman v. Lapp*, 19 N. Y. Supp. 831.

Water pipes are ordinarily a part of the realty. *Cohen v. Kyler*, 27 Mo. 122; *Smyth v. Sturges*, 108 N. Y. 495. So, a faucet attached to a hot-water boiler in a house. *Kirchman v. Lapp*, 19 N. Y. Supp. 831. So a water pipe laid from the house over the land of another to a highway for the purpose of bringing water to the house was held to pass by a conveyance of the house. *Philbrick v. Ewing*, 97 Mass. 133. So, an iron pipe attached for heating purposes by slings and hangers. *Quinby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. 260. But as to hot-water boiler, see *Philadelphia Mortg. & Trust Co. v. Miller*, 20 Wash. 607, 56 Pac. 382.

Mirrors: A mirror in a parlor was firmly attached to the chimney breast by a molding and a seat of the same character as the rest of the woodwork in the room. Part of the plaster was knocked off in removing it, and a new baseboard had to take the place of the seat of the mirror. The chimney breast was not complete, nor in keeping with the rest of the finishings in the room, without the mirror. Held, that the mirror was part of the real estate. *Spinney v. Barbe*, 43 Ill. App. 585. Mirrors set in the recesses of a wall, the removal of which leaves the walls in a roughened state, pass by sale to the purchaser of the real estate. *Mackie v. Smith*, 5 La. Ann. 717, 52 Am. Dec. 615.

²² **Shelves, drawers, and counters:** Tables put up by the owner to fit the building for the purposes of a retail dry goods and grocery store, the removal of which would practically reduce them to so much lumber, are a part of the realty. *Tabor v. Robinson*, 36 Barb. (N. Y.) 483.

Partitions in a store are a part of the realty. *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544. So, drawers of wood flush with the plastering in a dry-goods store. *Connor v. Squiers*, 50 Vt. 680.

Awning frames and an awning attached to a building are a part

§ 55. As affected by agreement of the parties.

Whether certain articles annexed to the realty shall pass by conveyance or not, as between grantor and grantee, may be controlled by the agreement of the parties.²⁷

of the realty. In *re Hitchings*, 4 N. B. R. (2d Ed.) 384, Fed. Cas. No. 6,542. So, a hotel sign, intended for a permanent sign for the house, fastened to the arm of a post set in the street several feet from the front line of the hotel lot, and three or four feet in the ground, and secured by a band of iron spiked to the sidewalk. *Redlon v. Barker* (1868) 4 Kan. 445.

Counters, meat racks, and ice box used in a grocery business and meat shop do not pass by a deed of the premises. *Griffin v. Jansen*, 19 Ky. Law Rep. 19, 39 S. W. 43.

²³ *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251; *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am. Dec. 622; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299; *Hays v. Doane*, 11 N. J. Eq. 84; *Shaw v. Lenke*, 1 Daly (N. Y.) 487; *Kirchman v. Lapp*, 19 N. Y. Supp. 831; *Jarechi v. Philharmonic Soc.*, 79 Pa. 403, 21 Am. Rep. 78; *Funk v. Brigaldi*, 4 Daly (N. Y.) 359; *Penn Mut. Life Ins. Co. v. Thackara*, 10 Wkly. Notes Cas. (Pa.) 104; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Guthrie v. Jones*, 108 Mass. 191; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. But see *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Metc. (Ky.) 357; *Hays v. Doane*, 11 N. J. Eq. 84; *Central Trust & Safe Deposit Co. v. Cincinnati Grand Hotel Co.*, 26 Wkly. Law Bul. 149.

See, also, ante, c. 6, note 39.

²⁴ *Hays v. Doane*, 11 N. J. Eq. 84.

²⁵ *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544. Gasoliers, being part of gas pipes, pass by conveyance. *Sewell v. Angerstein*, 18 Law T. (N. S.) 300. Gas brackets, made of stucco, and forming part of the architectural design of the room, and gas pipes laid in the ground, are part of the realty. *Gas Company v. Hunter*, 2 R. I. 157. So, as to gas generator, gas pump, and gas furnaces. *Keeler v. Keeler*, 31 N. J. Eq. 181.

²⁶ **Fence rails:** Fence rails are held to pass by a sale of the realty only where they are laid up into fence permanently, or where they have been hauled up along a line, upon which it is intended to

— (a) Provisions in a deed.

As a general proposition, a deed of the freehold to a purchaser conveys all fixtures upon the land, considering the place them in a fence permanently. *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500.

Fence rails laid into a fence, and not otherwise connected with the realty than by their weight, pass by conveyance of the land. *Seymour v. Watson*, 5 Blackf. (Ind.) 555; 36 Am. Dec. 556; *Burlerson v. Teeple*, 2 G. Greene (Iowa) 542; *Glidden v. Bennett*, 43 N. H. 306; *Mitchell v. Billingsley*, 17 Ala. 391. So, fence temporarily detached from the freehold passes by grant of the land. *Goodrich v. Jones*, 2 Hill (N. Y.) 142. See, also, *Climmer v. Wallace*, 28 Mo. 556; *Collins v. Bartlett*, 44 Cal. 371. So, in *Conklin v. Parsons*, 1 Chand. 240, 2 Pin. (Wis.) 264, rails which were placed along the line intended for the fence on the land were held to pass by a deed of the land. See, also, *Ripley v. Paige*, 12 Vt. 353.

So, where rails, constituting a fence on a farm which has been conveyed by deed, have been loaned to a neighbor, and are, at the time of the conveyance, upon the neighbor's property, they pass by the conveyance, being considered, in contemplation of law, temporarily severed. *McLaughlin v. Johnson*, 46 Ill. 163.

But a portable fence, composed of posts and boards erected on public land, and resting wholly on the surface, are, seemingly, personalty. *Pennybecker v. McDougal*, 48 Cal. 160. But rails not in a fence are not a part of the realty. *Robertson v. Phillips*, 3 Iowa, 220.

So, fence rails piled upon the land at the time of its sale do not pass by the deed, though they had previously been in a fence on the land for nearly fifty years. *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 174.

Boards which, for some years, had been in use as a permanent floor in a corn barn, and stone posts deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon, are a part of the realty. *Hackett v. Amsden*, 57 Vt. 432.

Hop poles necessarily used in cultivating hops, even though severed from the land, and piled in a yard with the intention of replacing them in the season of hop raising, are a part of the realty. *Bishop v. Bishop*, 11 N. Y. 123. So, nursery trees grow-

term "fixtures" to include only those annexed articles as would be legally determined irremovable. It appears that the

ing upon the land of the grantor pass by conveyance to the grantee. *Smith v. Price*, 39 Ill. 28. So, trees cut down and lying on the ground where they fell pass by deed of the freehold. *Brackett v. Goddard*, 54 Me. 309.

All manure made upon the farm in the ordinary course of husbandry, if upon the premises at the time of the conveyance, whether in the field or about the barn in heaps, will pass by deed of the land. *Daniels v. Pond*, 21 Pick. (Mass.) 367; *Hill v. De Rochement*, 48 N. H. 87; *Conner v. Coffin*, 22 N. H. 538; *Sawyer v. Twiss*, 26 N. H. 345; *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Parsons v. Camp*, 11 Conn. 525; *Plumer v. Plumer*, 30 N. H. 558; *Kittredge v. Woods*, 3 N. H. 503; *Wetherbee v. Ellison*, 19 Vt. 379; *Stone v. Proctor*, 2 D. Chip. (Vt.) 108; *Lewis v. Jones*, 17 Pa. 262. But see *Ruckman v. Outwater*, 28 N. J. Law, 581, where manure lying in and around the barnyard was held not to pass to the grantee. See ante, § 36a, "Manure."

Growing grain passes by conveyance of the land to the grantee. *Foote v. Colvin*, 3 Johns. (N. Y.) 216; *Kittredge v. Woods*, 3 N. H. 503; *Crews v. Pendleton*, 1 Leigh (Va.) 297; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Heavilon v. Heavilon*, 29 Ind. 509. So, growing plants. *Wintermute v. Light*, 46 Barb. (N. Y.) 278. But see *Smith v. Johnston*, 1 Pen. & W. (Pa.) 471; 4 Kent, Comm. (9th Ed.) 549.

A bell in the cupola of a barn, hung on an axle resting upon a wood frame, is a part of the realty. *Weston v. Weston*, 102 Mass. 514. But contra as to plantation bell merely set up on posts. *Cole v. Roach*, 37 Tex. 413.

Miscellaneous articles held to be a part of the realty: A factory bell placed in a tower built upon the factory for that purpose. *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86. A stone statue, weighing three tons, erected as an ornament to grounds. *Snedeker v. Warring*, 12 N. Y. 170. An organ in a church, fitted and adapted to a recess made to receive it, and fastened to the platform upon which it rested, was held to pass by conveyance of the realty. *Rogers v. Crow*, 40 Mo. 91. So, ice in an ice house on hotel property. *Hill v. Mundy*, 89 Ky. 36. Windlass in slaughter-

term "fixtures," when used in a conveyance, includes all articles annexed to the realty. Thus, a conveyance of realty with all the fixtures includes not only the so-called "irremovable fixtures," but those annexed articles which would come under the denomination of "removable fixtures."²⁸ So, a conveyance of a mill, manufacturing plant, or factory, *eo nomine*, with appurtenances, includes all fixtures essential to the plant conveyed, whether realty or personalty.²⁹ Likewise, a grantor, by express stipulation in a conveyance, may reserve to himself certain fixtures.³⁰ So, provisions in a deed particularly enumerating certain fixtures which are to pass by the conveyance impliedly reserved to the grantor other fix-

house, the ends passing through holes in upright pieces of timber firmly nailed at top and bottom. *Capen v. Peckham*, 35 Conn. 88. Monument consisting of a stone foundation, a marble base surmounted by a marble shaft, and a statue surmounting with shaft, the whole structure being cemented together, and constituting a solid mass, are a part of the realty. *Oakland Cemetery Co. v. Bancroft*, 161 Pa. 197.

²⁷ See chapter 5, note 1, "Agreements as to the Character of Fixtures."

²⁸ *Pickerell v. Carson*, 8 Iowa, 544; *Sawyer v. Long*, 86 Me. 541; *Martin v. Cope*, 28 N. Y. 180.

²⁹ *Wright v. Chestnut Hill Iron Ore Co.*, 45 Pa. 475; *Hoskin v. Woodward*, 45 Pa. 42; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116; *Martin v. Cope*, 28 N. Y. 180.

Conveyance of a saw mill, with the privileges and appurtenances, passes the mill chains, dogs, and bars used in connection with the same. *Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201; *Hancock v. Jordan*, 7 Ala. 448, 42 Am. Dec. 600; *Baldwin v. Walker*, 21 Conn. 168; *Lathrop v. Blake*, 23 N. H. 46; *Potts v. New Jersey Arms & Ordnance Co.*, 17 N. J. Eq. 404; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

³⁰ *Fortman v. Goepper*, 14 Ohio St. 558; *Folsom v. Moore*, 19 Me. 252; *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251.

tures, not enumerated, and this upon the maxim, *Expressio unius est exclusio alterius*.³¹

— (b) Collateral agreement.

The parties also, by an agreement extrinsic and collateral to the instrument of conveyance, may treat annexed articles as personalty or realty.³² But where a conveyance by deed of certain fixtures is made, and a bill of sale or chattel mortgage is afterwards given to the grantee to guard against any mistake as to the transfer of the property, the bill of sale or chattel mortgage is ordinarily ineffective to make the fixtures personalty.³³

— (c) Parol reservation.

But a parol reservation of certain fixtures, made by the

³¹ In *Hare v. Horton*, 5 Barn. & Adol. 715, where a deed conveyed an iron foundry and dwelling house, "together with all grates, boilers, bells, and other fixtures," it was held that, although the mere conveyance of the foundry itself would have carried all the fixtures appurtenant to the foundry, yet the express mention of the fixtures in connection with the house excluded those in the foundry, upon the maxim, "*Expressio unius est exclusio alterius*." See, also, *Leonard v. Stickney*, 131 Mass. 541.

³² In *Merrill v. Wyman*, 80 Me. 491, a grantee conveyed an unoccupied mill privilege by metes and bounds, and in the same deed, in a distinct clause, he conveyed the machinery and the appurtenances of the grist mill, with the right to use the said machinery for two years. It was held that this transaction made the machinery personal property. See *Folsom v. Moore*, 19 Me. 252.

³³ In *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489, the grantor conveyed to the grantee certain property, upon which was situated a twine factory, by a deed describing the land only. Afterwards, at the request of the grantee, he gave a bill of sale of the machinery, tools, and fixtures in the factory. It was held that all the machinery, etc., were a part of the realty.

grantor before or at the time of the conveyance, has generally been considered ineffective to make the articles personalty, for the reason that parol contemporaneous evidence is inadmissible to vary the terms of a valid written instrument;³⁴

³⁴ In *Smith v. Price*, 39 Ill. 29, the parol agreement between the grantor and grantee, reserving to the grantor fruit and ornamental trees in a nursery, was held inadmissible, for the parties, in executing the written instrument of conveyance, made it the exclusive evidence of the terms of their agreement.

So, a parol agreement, made at the time of the deed of the premises, to the effect that certain dye kettles on the realty should not pass by the conveyance, is invalid. *Noble v. Bosworth*, 19 Pick. (Mass.) 314.

So, all preliminary negotiations and parol reservations in regard to a cider mill and its appurtenances are merged into the written contract of conveyance, and the only question is whether, as a matter of law, the cider mill, situated as it was, passed by the deed. *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

So, a barn erected on stone piers was held to be a part of the realty, irrespective of a parol agreement to the contrary. *Landon v. Platt*, 34 Conn. 517. See, to the same effect, *Chapman v. Long*, 10 Ind. 465; *Turner v. Cool*, 23 Ind. 56. See, also, *Detroit, H. & I. R. Co. v. Forbes*, 30 Mich. 166; *Conner v. Coffin*, 22 N. H. 538; *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

But in *Heavilon v. Heavilon*, 29 Ind. 509, where the grantor, upon sale of the land, reserved to himself by parol the growing crops, it was held that the agreement was valid, inasmuch as it affected the consideration of the deed, which may always be proved or explained by parol proof.

So, in *Pea v. Pea*, 35 Ind. 397, where property was sold upon which there was a saw mill, so situated as to be moved from place to place, the court, after an exhaustive argument and review of the cases, and after admitting that a parol reservation of a steam flour mill could be invalid, held that a parol reservation of the mill was valid, inasmuch as it was not a permanent fixture. See, also, *Noble v. Sylvester*, 42 Vt. 146, where a loose stone was held removable under a parol agreement. Likewise, the mere declaration of the owner that he intends that certain gas fixtures shall pass

and in some cases the further reason is advanced that fixtures, while annexed, are a part of the realty, and hence any agreement relating thereto is within the statute of frauds.³⁵

with the house as a part of the realty is of no effect. *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38.

So, a house that is a part of the realty cannot be made a chattel by a mere parol understanding. *Aldrich v. Husband*, 131 Mass. 480.

So, in *Smith v. Odom*, 63 Ga. 499, where there was a conveyance of land, a parol agreement reserving to the grantor a house upon the property was ineffective, as being contradictory to the deed, but it was held that a parol understanding could be shown that the cotton gin and running gear thereof upon the realty should be excluded from the operation of the deed.

³⁵ In *Bond v. Coke*, 71 N. C. 97, the court said: "The deed, in our case, containing no exception of the gin and press, the legal effect of it is to pass them to the defendant, and no parol evidence to the contrary is admissible. The exception of the gin and press at the sale being an agreement touching the sale of an interest in lands, the statute of frauds requires it to be in writing. And even if the agreement reserving the gin and press had been in writing, it could only be set up by a bill in equity to reform the deed on the ground of accident or mistake in the draftsman. * * * Personal chattels which have been fixtures are incorporated in, and are a part of, the land, as much as a house or tree, until an actual severance, and, therefore, a deed conveying the land without excepting therein the fixtures has the legal effect of passing the gin or press, which are part and parcel of the land." To the same effect see *Horne v. Smith*, 105 N. C. 323, 18 Am. St. Rep. 903, as to saw mill, engine, and boiler. But in *Meyers v. Schemp*, 67 Ill. 469, where a building was burned, and the owner afterwards verbally sold the brick, some of which had been severed by the fire, but the greater part remained in the walls, it was held that the brick in the walls was realty, and the sale, being an entirety, was within the statute of frauds.

In this connection it is to be noted that fixtures ordinarily are not considered as an interest in land, so as to be within the fourth section of the statute of frauds. Thus, a tenant by parol may
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§ 56. As affected by custom.

Ordinarily, the existence of a custom in regard to certain fixtures cannot control the effect of a deed of the land upon which they are situated.³⁶

§ 57. As affecting third persons claiming under grantor or grantee.

The general rule of law which obtains as to fixtures between grantor and grantee likewise applies to third persons claiming under a grantor or a grantee.³⁷ Hence, chattels annexed, which, as between grantor and grantee, are a part of

sell his right to remove his fixtures. So, a vendor in contemplation of immediate severance may sell his fixtures by parol. But as between grantor and grantee, in connection with a sale of the realty, a transfer of fixtures is within the statute, and must be evidenced by an instrument in writing. See 1 Wm. Saund. 277; *Curtis v. Riddle*, 7 Allen (Mass.) 185; *Ewell*, Fixtures, p. 343; *Tyler*, Fixtures, p. 730; *Amos & Ferard*, Fixtures, p. 253.

See ante, c. 5, "Agreements as to the Character of Fixtures," § 28b, and note 18.

³⁶ *Boyd v. Shorrock*, L. R. 5 Eq. 72, 17 Law T. (N. S.) 197, 16 Wkly. Rep. 102.

In *Christian v. Dripps*, 28 Pa. 271, it was held that the rule of law as to what fixtures of a manufactory were a part of the freehold could not be evaded by proof of a contrary custom.

So, in *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756, the court said: "We cannot conceive how there could be a custom to control the effect of a deed between grantor and grantee. What would pass by the deed as part of the realty could only be excepted by an express reservation, and such reservation would have to be made in every deed, for no number of express reservations in deeds would establish a custom. A custom which might be clearly established as between landlord and tenant could not possibly affect a conveyance by the owner of the fee who had annexed the chattels to the realty." See *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108⁹.

³⁷ See ante, c. 7, note 1.

the realty, or are removable, are likewise treated, in the absence of any agreement as against any third person claiming under either. But where there is an express agreement governing the character of the chattel annexed, the rights of a third party, as claimant to the same, vary in accordance with the circumstances. In this respect the question arises most frequently between conditional vendors or chattel mortgagees of annexed chattels, who have permitted the grantor to annex to the freehold the articles sold or mortgaged, and subsequent purchasers or grantees of the realty.

— (a) **As between a conditional vendor or chattel mortgagee of fixtures and a grantee of the realty.**

Where there is an express or implied agreement between the immediate parties treating certain annexed chattels as personalty, the better weight of opinion is to the effect that a subsequent purchaser or vendee of the realty to which the chattels are affixed, who is a purchaser *bona fide* and without notice of the agreement, takes title to all fixtures upon the freehold at the time of the conveyance, which, as between grantor and grantee, would be legally determined irremovable, irrespective of the claims of a conditional vendor or a chattel mortgagee of the same.³⁸ But where the grantee of

³⁸ Porter v. Steel Co., 122 U. S. 267; Landon v. Platt, 34 Conn. 517; Rowand v. Anderson, 33 Kan. 264, 6 Pac. 255, 52 Am. Rep. 529; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802; Ridgeway Stove Co. v. Way, 141 Mass. 557, 6 N. E. 714; Hunt v. Iron Co., 97 Mass. 279; Jenks v. Colwell, 66 Mich. 428, 33 N. W. 528; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135; Knowlton v. Johnson, 37 Mich. 47; Bass Foundry & Mach. Works v. Gallentine, 99 Ind. 525; Haven v. Emery, 33 N. H. 69; Vorhees v. McGinnis, 48 N. Y. 278; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Muir v. Jones, 23 Or. 332, 31 Pac. 646, 19 L. R. A. 441; Freeman v. Lynch, 8 Neb. 192; Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Davenport v. Shants, 43 Vt. 546; Taylor v. Collins, (270)

the realty has notice, or is not a purchaser in good faith, he is subject to all the equities existing against his grantor.³⁹ As to the question of notice, apparently, the recording of a chattel

51 Wis. 123, 8 N. W. 22; *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 694, 41 S. W. 835.

A vendor who puts it within the power of the vendee to attach chattels to land as fixtures thereof, and, as such, to sell the land to innocent purchasers, is not in a position to complain, and to claim the chattels when so annexed and sold. It was so held, as between a purchaser at a sheriff's sale of land to which had been annexed wagon scales, and a conditional vendor of the scales, who had sold the same to the vendee on condition that the title should not pass until the price therefor was paid. *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789.

"The rule is settled beyond controversy in this state that, as to conditional sales of personal property, retaining the title in the vendor until paid for, no subsequent vendee obtains the title while the property remains personalty. This is upon the theory that the possession of movable property, known as 'chattels,' is not conclusive of ownership or right of possession, and that he who buys takes subject to the title of the real owner. When personal property is attached to, and becomes a part of, the realty, a different rule applies. Title of record and possession of real estate are usually conclusive, and a bona fide holder takes title free from any existing equities. As between the original vendor and vendee, no title passes, and, as between them, the vendee cannot make it realty contrary to his agreement. In such cases the intention of the parties must govern. When, however, the vendor sells machinery which-it is well understood may, and, in the absence of agreement, does, become part of the realty by being so attached that it cannot be removed without injury, and thereby places it in the power of his vendee to so attach it, and sell or mortgage to innocent third parties, the better and more just rule is that he must suffer."

It was so held as between a mortgagee, bona fide and without no-

³⁹ See ante, c. 5, "Agreements as to the Character of Fixtures," § 29b, "Subsequent Vendees and Mortgagees of the Realty," and notes 40, 41, thereunder.

mortgage is not constructive notice to a subsequent *bona fide* vendee of the realty.⁴⁰

— (b) As between a lessee or licensee and a grantee of the realty.

Likewise, as against a subsequent grantee of the realty, the same rules of law apply to fixtures erected by a lessee⁴¹ or licensee.⁴²

— (c) Want of unity of title.

In this connection it may be observed that there is a certain line of cases, particularly in Michigan, which hold that, where there is ownership of the land in one person, and of the thing affixed to it in another, and the chattel annexed is in its nature capable of severance without injury to the realty, the article

tice, of land to which an engine, boiler, and other machinery in a shingle mill were so attached as to be ordinarily a part thereof, and a conditional vendor of the same. *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375.

So, where a conditional vendor sold a steam pump on credit for use in a peppermint distillery, and the vendee attaches the same and sells the realty to a *bona fide* purchaser, the steam pump is a part of the realty. *Watson v. Alberts*, 120 Mich. 508, 79 N. W. 1048.

So, as between a *bona fide* grantee of real estate upon which there is situated a house which is ordinarily a part of the freehold, and a chattel vendee of the grantor of the realty, claiming title to the house by reason of an alleged sale thereof to him as personalty, the house passes to the vendee with the sale of the realty. *Moore v. Moran* (Neb.; 1902), 89 N. W. 629.

See chapter 5, *supra*, § 29b, "Subsequent Vendees and Mortgagees of the Realty," and notes 33-35.

⁴⁰ See ante, c. 5, "Agreements as to the Character of Fixtures," § 29b, "Subsequent Vendees and Mortgagees of the Realty," and note 43 thereunder.

⁴¹ See chapter 6, *supra*, "Fixtures as Between Landlord and Tenant," and notes 108-111.

⁴² *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

annexed remains personalty. This holding has arisen upon the theory of want of unity of title in the freehold and the thing annexed to the freehold. Thus, where the owner of the chattel annexed to the freehold has also an undivided interest in the freehold, the chattel does not become a part of the realty, for the reason that a thing cannot, as to an undivided interest therein, be real estate, and, as to another undivided interest, be personalty. There is a want of unity of title in the thing annexed and in the realty.⁴³

⁴³ Want of unity of title: In *Adams v. Lee*, 31 Mich. 440, the plaintiff annexed machinery, of which he was the sole owner, to the real estate, of which he owned an undivided interest. The court said: "All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact, of itself, is conclusive that the former was personalty; for, to constitute a fixture, there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only; and the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and, as to another undivided interest, be personalty. It must be the one thing or the other. And the position which is taken by Lee in this case involves this absurdity: that Kaufman, at the time when he and Kinney were severally the owners of an undivided half of the land, might have sold that, and, as a necessary consequence, transferred an undivided one-half of the machinery also, though the whole of the machinery belonged to Kinney, as exclusive owner. This would be the necessary result if the machinery was real estate, for there could be no such a thing as attaching it to an undivided interest in the land only." So, in *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061, 30 Am. St. Rep. 488, one Myers bought a porta-

ble saw mill, consisting of a boiler, engine, etc., to be paid for by installments, the title and right of possession to remain in the plaintiff, the vendor, until the price was paid in full. Myers owned an undivided interest in a farm, to which he removed the saw mill. The machinery of the mill was not so annexed to the realty as to be incapable of severance without injury to the realty. Myers conveyed the farm by quitclaim deed to the defendant, and, upon an action of trover by the plaintiff, it was held that the saw mill in question was personalty, upon the theory of want of unity of title. So, in *Schellenberg v. Detroit Heating & Lighting Co.* (Mich.; 1902) 90 N. W. 47, where machinery was purchased by a husband under a contract that title was to remain in the seller until paid for, and it was installed by the seller, at the request of the husband, on real estate held in entirety, in the name of the husband and wife, the want of unity of title to the machinery and ownership of the land prevented the machinery from becoming a part of the realty, and it was held removable by the seller. See, also, *Robertson v. Corsett*, 39 Mich. 777; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

CHAPTER VIII.

FIXTURES AS BETWEEN MORTGAGOR AND MORTGAGEE.

- § 58. General rule.
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 - (d) As between a lessee of the mortgagor and a subsequent mortgagee of the realty.
 - (e) As between purchaser at foreclosure of the mortgage and mortgagor of the realty.

§ 58. General rule.

As between mortgagor and mortgagee, the same general

rule applies as between grantor and grantee, and all fixtures, whether actually or constructively annexed, ordinarily are carried by a mortgage of the freehold, unless expressly excepted by the terms of the conveyance.¹ The old rule of the common law, that whatever is annexed to the freehold becomes a part thereof, has been held to apply, in all its strictness, to fixtures between mortgagor and mortgagee,² although there has been a tendency, particularly in those states where a mortgage is treated as merely security for a debt,

¹ *Sands v. Pfeiffer*, 10 Cal. 259; *Cunningham v. Cureton*, 96 Ga. 492, citing 8 Am. & Eng. Enc. Law (1st Ed.) pp. 53-55; *Kloess v. Katt*, 40 Ill. App. 99; *Arnold v. Crowder*, 81 Ill. 56; *Johnson's Ex'r v. Wiseman's Ex'r*, 4 Mete. (Ky.) 321; *Woodham v. First Nat. Bank of Crookston*, 48 Minn. 67, 50 N. W. 1015; *Thomas v. Davis*, 76 Mo. 42; *Tate v. Blackburne*, 48 Miss. 1; *Weathersby v. Sleeper*, 42 Miss. 732; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 232, 37 Am. Dec. 203; *Kittredge v. Woods*, 3 N. H. 503; *Lathrop v. Blake*, 23 N. H. 64; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Burnside v. Twitchell*, 43 N. H. 390; *Snedeker v. Warring*, 12 N. Y. 170; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Laffin v. Griffiths*, 35 Barb. (N. Y.) 58; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 247; *Cahn v. Hewsey*, 31 Abb. N. C. (N. Y.) 387, 8 Misc. Rep. 384; *Davidson v. Westchester Gaslight Co.*, 99 N. Y. 558; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21; *Foote v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411; *Montague v. Dent*, 10 Rich. Law, 135; *Leland v. Gasset*, 17 Vt. 403; *Preston v. Briggs*, 16 Vt. 124.

In *Tillman v. De Lacy*, 80 Ala. 103, it was said that there is perhaps somewhat more liberality in favor of a mortgagee than in favor of a vendee.

² *Gardner v. Finley*, 19 Barb. (N. Y.) 317.

In *Crane v. Brigham*, 11 N. J. Eq. 29, the court said: "As between mortgagor and mortgagee, when we have once established the facts that a thing appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, its character as a fixture resulting to the benefit of the mortgagee is determined."

to modify the harshness of its application in relation to fixtures annexed subsequent to the execution of a mortgage. What fixtures are a part of the realty, as between mortgagor and mortgagee, depends primarily upon the fact whether they would be termed "irremovable" or not, in accordance with the general tests of fixtures.³

§ 59. The tests.

As to these tests, the same general rules and principles discussed in a previous chapter are here applicable and determinative between these parties.⁴ Thus, whether an article shall be deemed realty or personalty, as between mortgagor and mortgagee, is made to depend upon the character of the chattel itself, the fact of annexation, its adaptability to the use of the freehold, the purpose to which it is devoted, and the intentions of the parties relative thereto. These tests have been fully discussed in a previous chapter of this work, and it is not necessary to consider them here further than to show their application to specific fixtures.⁵

§ 60. Fixtures annexed subsequently to the execution of the mortgage.

The greater weight of authority undoubtedly is to the effect that fixtures annexed subsequently to the execution of a mortgage are a part of the realty, and cannot be removed or otherwise disposed of during the life of the mortgage by the mortgagor without the consent of the mortgagee;⁶ for

³ *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157.

⁴ See post, note 5.

⁵ See ante, c. 3, "The Requisites and Tests of a Fixture," §§ 18-21.

⁶ *Sands v. Pfeiffer*, 10 Cal. 259; *Union Water Co. v. Murphy's Flat Fluming Co.* (1863) 22 Cal. 631; *Seedhouse v. Broward*,

in such a case the mortgagor is considered as evincing an intention to redeem the property, and whatever fixtures of a permanent character he annexes are added for his own benefit. The grounds of this rule are based upon the idea that the mortgagor may always protect himself by paying the debts secured, and redeeming the premises,⁷ and that

34 Fla. 509; *Cunningham v. Cureton*, 96 Ga. 492, citing *Am. & Eng. Enc. Law* (1st Ed.) vol. 8, p. 50; *Wood v. Whelen*, 93 Ill. 153; *Bowen v. Wood*, 35 Ind. 268; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S. W. 170; *Mutual Ben. Life Ins. Co. v. Huntington*, 57 Kan. 744; *Weil v. Lapeyre*, 38 La. Ann. 303; *Smith v. Goodwin* (1822) 2 Me. 173; *Corliss v. McLagin*, 29 Me. 115; *Parsons v. Copeland*, 38 Me. 537; *Wight v. Gray*, 73 Me. 297; *McKim v. Mason*, 3 Md. Ch. 186; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Thompson v. Vinton*, 121 Mass. 139; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 522, 15 Am. St. Rep. 235; *Butler v. Page*, 7 Metc. (Mass.) 42, 39 Am. Dec. 757; *Cole v. Stewart*, 11 Cush. (Mass.) 181; *National Bank of Sturgis v. Levanseler*, 115 Mich. 372, 73 N. W. 399; *Lord v. Detroit Sav. Bank* (Mich.; 1903) 93 N. W. 1063; *Curry v. Schmidt*, 54 Mo. 515; *Dutro v. Kennedy*, 9 Mont. 101; *Pettengill v. Evans*, 5 N. H. 54; *Burnside v. Twitchell*, 43 N. H. 393; *Langdon v. Buchanan*, 62 N. H. 660; *Doughty v. Owen* (N. J. Ch.; 1890) 19 Atl. 540; *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452; *Roddy v. Brick*, 42 N. J. Eq. 218; *Snedeker v. Warring* (1854) 12 N. Y. 170; *Davidson v. Westchester Gaslight Co.*, 99 N. Y. 558; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Cooper v. Harvey*, 62 Hun, 618, 16 N. Y. Supp. 660; *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58; *Phoenix Mills v. Miller*, 4 N. Y. St. Rep. 787; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 247; *Foote v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411; *Bond v. Coke*, 71 N. C. 97; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71; *Hutchins v. Lathrop*, 8 Law Rep. 82; *Frankland v. Moulton*, 5 Wis. 1; *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465.

⁷ *Corliss v. McLagin*, 29 Me. 115; *Graeme v. Cullen*, 23 Grat. (Va.) 266-290.

the mortgagee, inasmuch as he is subjected to any depreciation or fluctuation in the value of the realty mortgaged, should have the advantage of any improvement of his security, whether it be by cultivation or improvement of the property.⁸ But in some of the states where a mortgage is treated as conveying neither the legal title nor the right to the possession, but only as a mere security, there is a general tendency to repudiate the old common-law rule as inapplicable, and to hold that there is no absolute presumption that the fixtures were annexed for the benefit of the realty.⁹

⁸ *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71.

⁹ In the case of *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821, the court said: "It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty; but this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance; but the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence, in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security. This would seem just, for, the annexation not

The reason for this holding is that the mortgagee has not been misled or advanced anything on the faith of the subsequent annexation, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation.¹⁰ The general rule, however, has been held to apply even to annexations of chattels made after foreclosure of the mortgage.¹¹

§ 61. Relation of the parties.

The relation of mortgagor and mortgagee is usually considered where there is a defeasible conveyance of the fee of the freehold; but the law applies equally well to a mort-

having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation. *Crippen v. Morrison*, 13 Mich. 23; *Davenport v. Shants*, 43 Vt. 546. See, also, *Tift v. Horton*, 53 N. Y. 380."

So, in the case of *Tillman v. De Lacy*, 80 Ala. 103, the statement is made that, where a chattel is annexed to the real estate after the execution of a mortgage thereon, stronger evidence of an intention to make the article a part of the realty is required. See *Clore v. Lambert*, 78 Ky. 224. This case is ruled by the later case of *Bank of Louisville v. Baumeister*, 87 Ky. 6, where the court said that fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security if they are attached for the permanent improvement of the estate, and not for a temporary purpose, or if they are such as are regarded as permanent in their nature, or if they are so fastened or attached to the realty as that the removal of them would be an injury to it. See, also, *Davenport v. Shants*, 43 Vt. 546.

¹⁰ *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821; *Crippen v. Morrison*, 13 Mich. 23; *Tift v. Horton*, 53 N. Y. 380.

¹¹ *Guernsey v. Wilson*, 134 Mass. 482.

gage of an estate for years, or any lesser estate. Thus, where a tenant mortgages his leasehold interest, chattels annexed by him pass to the mortgagee, even though they were removable as against his landlord.¹² So, the same rule obtains in respect to a mortgagee in possession;¹³ likewise, between an equitable mortgagor and mortgagee;¹⁴ so, to parties to a deed of trust.¹⁵

§ 62. Trade fixtures and other tenant's fixtures.

The fact that articles attached to the mortgaged premises have been devoted to purposes of trade, domestic convenience, or ornament does not entitle them to removal by the mortgagor.¹⁶ The exception to the general rule of fixtures grant-

¹² *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483; *San Francisco Breweries v. Schurtz*, 104 Cal. 420; *Southport & West Lancashire Banking Co. v. Thompson*, 37 Ch. Div. 64, explaining dictum of Blackburn, J., in *Hawtry v. Butlin*, L. R. 8 Q. B. 293. See, also, to the same effect, *Hitchman v. Walton*, 4 Mees. & W. 409, 1 Horn & H. 374, 8 Law J. Exch. 31; *Meux v. Jacob*, 44 Law J. Ch. 481, L. R. 7 H. L. 481, 32 Law T. (N. S.) 171, 23 W. R. 526, 22 W. R. 609; *Longstaff v. Meagoe*, 2 Adol. & E. 167, 4 Law J. K. B. 28.

¹³ *Clark v. Smith*, 1 N. J. Eq. 121; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275.

¹⁴ *Ex parte Broadwood*, 1 Montagu, D. & D. 631; *Ex parte Cowell*, 17 Law J. Bankr. 16, 12 Jur. 411; *Ex parte Barclay*, 5 De Gex, M. & G. 403; *Ex parte Bentley*, 2 Montagu, D. & D. 591, 6 Jur. 719; *Williams v. Evans*, 23 Beav. 239; *Ex parte Tagart*, 1 De Gex, 531; *In re Richards*, 38 Law J. Bankr. 9, 4 Ch. App. 630, 20 Law T. (N. S.) 997, 17 Wkly. Rep. 997.

¹⁵ *Phelan v. Boyd* (Tex.; 1890) 14 S. W. 290.

¹⁶ *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Day v. Perkins*, 2 Sandf. Ch. (N. Y.) 359; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456.

In *Maples v. Millon*, 31 Conn. 598, where creditors of a nurseryman who had mortgaged land used by him as a nursery claimed cer-

ed to the tenant, as against his landlord, does not obtain as between mortgagor and mortgagee. But where trade fixtures are erected by a partnership upon land of a partner which is subsequently mortgaged, it is held that they are removable by the partnership as against the mortgagee.¹⁷

§ 63. Machinery.

Articles of machinery in mills, manufacturing plants, factories, etc., and upon farms, which are actually or constructively annexed to the realty, or to a building or erection that is a part thereof, have been generally considered a part of the realty as between mortgagor and mortgagee.¹⁸

tain trees and shrubs as personal property as against the mortgagee, the court said: "As between landlord and tenant, many things which pass under the general name of 'fixtures' will, for the encouragement of trade, be permitted to be removed by the tenant during his term, which, as between heir and executor, vendor and vendee, or mortgagor and mortgagee, would be considered as parcel of the realty, and would therefore belong to the heir or vendee or mortgagee. And, as between landlord and tenant, it may be true of trees in a nursery garden, especially where land is let to a nursery gardener, to be used for the purposes of his trade, that they would be treated as personal chattels, removable by the tenant during his term. But admitting that this is so, it is an exception to the general rule." But see *Kelly v. Austin*, 46 Ill. 156.

¹⁷ *Robertson v. Corsett*, 39 Mich. 777, approving *Trappes v. Harter*, 2 Crompt. & M. 153. See, also, *Saunders v. Stallings*, 5 Heisk. (52 Tenn.) 65; *McDavid v. Wood*, 5 Heisk. (52 Tenn.) 95.

¹⁸ *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249 (agricultural implement factory, and machinery therein); *Rochereau v. Bobb*, 27 La. Ann. 657; *Farrar v. Stackpole*, 6 Me. 154; *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306; *National Bank of Sturgis v. Levanseler*, 115 Mich. 372, 73 N. W. 399; *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375; *Frankland v. Moulton*, 5 Wis. 1; *Ege v. Kille*, 84 Pa. 333; *Homestead Land* (282)

The mode of annexation, its adaptability, and the purpose of the machinery and the intention of the parties are important factors in ascertaining whether the machinery is a part of the freehold. Ordinarily there must exist some sort of annexation of the machinery in order to make it a part of the realty,—not necessarily physical annexation, but an actual or constructive annexation that shows an adaptability, purpose, and intention to permanently use the articles in connection with the freehold.¹⁹

Co. v. Becker, 96 Wis. 206, 71 N. W. 117; Taylor v. Collins, 51 Wis. 123.

¹⁹ Simply placing the machinery in position in a building, with the intention of making it a permanent part of the plant, is not sufficient to make such machinery a part of the realty, unless it is actually or constructively attached to the building or land. Farmers' Loan & Trust Co. v. Minneapolis Engine & Mach. Works, 35 Minn. 543, 29 N. W. 349.

In Wolford v. Baxter, 33 Minn. 12, 21 N. W. 744, it is said: "These other tests named, while having an important bearing upon the questions whether there has been an annexation, and, if so, its effect, do not, however, do away with the necessity of annexation, either actual or constructive, to constitute a fixture. * * * Intent alone will not convert a chattel into a fixture." See, also, Shepard v. Blossom, 66 Minn. 421, 69 N. W. 221.

In Cherry v. Arthur, 5 Wash. 787, 32 Pac. 744, the court said: "In ascertaining whether a machine does become part of the realty in favor of mortgagees, the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening, such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there."

Fixtures in a manufacturing establishment must be governed by the same criterion which applies to fixtures in other situations. The machinery and implements in such an establishment, although useful and even essential for the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can be easily removed without material injury to the building or the articles themselves, and their place supplied by other articles of a similar kind, are not fixtures, but personal property; but that portion of the machinery in such an establishment which is firmly affixed to the earth or to the structure of the building, and which, from its nature, mode of attachment, use, and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold.²⁰ Mere loose machinery, unless an essential or com-

²⁰ *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

In the case of *Hill v. Wentworth*, 28 Vt. 429, the court said: "We think the rule in this state should be that the various articles of machinery belonging to a manufactory are in no respect real estate, excepting as they are a part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. * * * The rule requiring actual annexation is not affected by those cases where a constructive annexation has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture."

In a laundry plant, an engine, boilers, and shafting, the engine
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ponent part of some other machine or mechanism, however, is generally considered personal property as between mortgagor and mortgagee.²¹ As to heavy machinery, such as engines, boilers, water wheels, shafting, and gearing used to furnish the motive power for factory, mill, or other building, the general rule is that such machinery is a part of the realty as between mortgagor and mortgagee.²² Machinery of this

being bolted to a stone, brick, or cement foundation; ironing machines made of steel rollers connected above to the shafting by a pulley and belt, and connected underneath with the boiler by steam pipes; washing machines bolted to the floor,—all are a part of the real estate, and covered by a mortgage thereon, but not office furniture, safes, tables, chairs, clocks, desks, small clothes press, etc., in no way attached to the realty. *Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 64 N. J. Eq. 140.

²¹ In the case of *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744, the court says: "While physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principle thing in prosecuting the business to which the realty is adapted, being considered a part of the freehold for any purpose. To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or, at least, it must be mechanically fitted so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete."

²² In *Winslow v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306, Chief Justice Shaw said: "In general terms, we think it may be said that when a building is erected as a mill [or other manufactory], and the water works or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, * * * are yet parts of it, and pass with it by a conveyance, mortgage, or attachment."

Steam boilers and an engine actually fastened to the ground in

character is generally solidly affixed to foundations built for the purpose, and is either physically annexed to the freehold, or held in place, equally well, by the force of gravity. Such

a stone quarry are a part of the realty, as between mortgagor and mortgagee. *Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. 21.

A boiler in a woolen mill, resting on brick foundations, is a part of the realty. *Cavis v. Beckford*, 62 N. H. 229.

An engine and boiler in a manufactory, used to propel the machinery, and fastened to a stone and brick foundation set into the ground three feet, pass with the land. *Doughty v. Owen* (N. J. Eq.; 1890) 19 Atl. 540.

An engine and boiler attached in a substantial manner to one of the buildings of a manufacturing plant are a part of the realty. *Shepard v. Blossom*, 66 Minn. 421, 69 N. W. 221. See *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426; *Wickes v. Hill*, 115 Mich. 333, 73 N. W. 375; *Perkins v. Swank*, 43 Miss. 349; *Scheifele v. Schmitz*, 42 N. J. Eq. 700; *Harris v. Haynes*, 34 Vt. 220; *Sweetzer v. Jones*, 35 Vt. 317; *Frankland v. Moulton*, 5 Wis. 1.

Engines and boilers firmly fastened to a building in a nail or tack factory are a part of the mortgaged premises. *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117.

Steam engines and boilers bolted and permanently fixed upon timbers and stone and brick foundation laid on the earth are part of the mortgaged premises. *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

The boilers and steam engine in a marble mill, which supply the motive power of the machinery of the mill, are a part of the realty. *Sweetzer v. Jones*, 35 Vt. 317.

A steam engine on a stone foundation built for it, and a boiler, bricked up, in a manufacturing plant, are a part of the mortgaged premises. *Fish v. New York Waterproof Paper Co.*, 29 N. J. Eq. 16.

The water power in a paper mill is a part of the realty. *Hill v. Farmers' & Mechanics' Nat. Bank*, 97 U. S. 450, 24 L. Ed. 1051. So, the engine and boilers of a flour mill. *Sands v. Pfeiffer*, 10 Cal. 258. Likewise, a steam engine in a tan yard, removable without injury to the freehold. *Sparks v. State Bank*, 7 Blackf. (Ind.) 469. So, a steam engine and boilers affixed to a building for manufacturing purposes. *McKim v. Mason*, 3 Md. Ch. 186. So, a boiler in fruit
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machinery is generally essential, and a prerequisite to the maintenance of the factory or manufacturing plant. But where motive machinery is so attached to the freehold as to show an apparent intention not to make it a part thereof, it is personalty.²³ So, shafting, gearing, and belting used in a factory or other manufacturing plant to connect the motive power to the rest of the machinery has also been held to come within the the general rule announced as to motive power.²⁴ But as to machinery in factories, mills, and manu-

canning factory, weighing ten thousand pounds, and resting upon a brick foundation. *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

An engine and boiler, together with shafting and pulleys, used to furnish the motive power to machinery, are realty, but not other machines fastened by screws and bolts to keep them steady in their places, and readily moved. *Keve v. Paxton*, 26 N. J. Eq. 107.

Steam engines, firmly attached to the freehold, are a part of the freehold. *Rice v. Adams*, 4 Har. (Del.) 332.

Steam engine and boiler in a machine shop pass with the land by mortgage. *Harris v. Haynes*, 34 Vt. 220.

A steam engine and boilers fixed in an anthracite furnace for the manufacture of iron are a part of the freehold, even though annexed subsequent to the execution of the mortgage. *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71.

Water wheels and their attachments are a part of the realty. *Davenport v. Shants*, 43 Vt. 546; *Keeler v. Keeler*, 31 N. J. Eq. 181.

²³ The mortgagor, seven years after the execution of the mortgage, placed on the mortgaged premises a boiler, saw rig, shingle mill, and planer, all of which could be removed without injury to the freehold. He did not disclose to the mortgagee his intention that they should not become a permanent accession to the realty. There was an existing custom to put such on the land, and to remove them at will. It was held that they were not a part of the realty. *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108.

²⁴ *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Corliss v. McLagin*, 29 Me. 115; *Winslow v. Merchants' Ins.*

facturing plants, other than that used for furnishing or transmitting the motive power, no such uniformity among the decisions in holding this class of machinery a part of the realty is observed as in the case of motive machinery.²⁵ The

Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Burnside v. Twitchell*, 43 N. H. 395; *Keve v. Baxton*, 26 N. J. Eq. 107; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Scheifele v. Schmitz*, 42 N. J. Eq. 700; *Lee v. Hubschmidt Building & Wood Working Co.*, 55 N. J. Eq. 623; *Hill v. Wentworth*, 28 Vt. 428.

²⁵ **Machinery and appliances in a brewery and distillery:** Steam engines, worms, tubs, and apparatus in a distillery, which may be removed without damage to the building, are nevertheless irremovable fixtures as between mortgagor and mortgagee. *Powell v. Striker*, 2 Am. Law J. (N. S.) 327. Casks in a brewery nine feet high and seven feet in diameter, so large as not to be removable from the building without making a hole in the floor, and used in the process of manufacturing beer, pass by mortgage of the land. *Meyer v. Orynski* (Tex. Civ. App.; 1894) 25 S. W. 655. Machinery and appliances for making beer pass with the land under a mortgage of the brewery. *Reyman v. Henderson Nat. Bank*, 98 Ky. 748, 34 S. W. 697. Machinery and appliances in a distillery are part of the realty. *Smith v. Altick*, 24 Ohio St. 369. In a brewery, the machinery and appliances for making beer, necessary and used for that purpose, pass with realty by mortgage. *Reyman v. Henderson Nat. Bank*, 98 Ky. 748, 34 S. W. 697. Casks and hogsheads and fermenting tubs and a copper cooler in a brewery, not fastened to the freehold, are not subject to a mortgage of the land. *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1. But tubs, vats, casks, etc., in a brewery, placed there for permanent use, and too large to pass out through any opening, are a part of the mortgaged premises. *Equitable Trust Co. v. Christ*, 2 Flip. 599, 47 Fed. 756. See *Scheifele v. Schmitz*, 42 N. J. Eq. 700.

Machinery in cotton or woolen mills: Looms in a textile factory, resting on the floor, and fixed only by their own weight, and connected with the machinery of the mill by belting, are a part of the mortgaged premises. *Cavis v. Beckford*, 62 N. H. 229. Machinery for the manufacture of cotton cloth, ponderous in its character, and not intended to be moved from place to place, but fastened per-

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question is made to turn largely upon the mode of annexation, and the adaptability and use of the machinery in con-

manently in position, is a part of the realty. So, loom beams not fastened to the looms, but laid upon them when in use. *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327. Carders, spinning jacks, looms and other like machinery in a woolen mill, although only attached to the building by cleats or screws to keep them in place, are a part of the realty. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Parsons v. Copeland*, 38 Me. 537; *Lyle v. Palmer*, 42 Mich. 314. Spinning frames and carding machines in a mill, fastened to the floor by cleats and pins, are not a part of the realty, as between mortgagor and mortgagee. *Cresson v. Stout*, 17 Johns. (N. Y.) 116. Likewise, where the spinning frames and carding machines were connected to the building by belts, and to the floor by cleats. *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157. So, spinning frames in a cotton mill, fastened by cleats and iron plates to the floor. *Swift v. Thompson*, 9 Conn. 63. So, carding machines in woolen mill, not nailed to the floor, or in any manner attached to the building. *Gale v. Ward*, 14 Mass. 352. Carding machines, spinning jacks, and power looms in factory, attached to the building, only so far as to confine the different parts in their proper places for use, and connected with the motive power by means of bands and straps, are personalty. *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. So, looms, cards, spinning frames, and speeders in a cotton mill, fastened to the building to secure their steady and uniform operation. *McKim v. Mason*, 3 Md. Ch. 186. Likewise, looms in a woolen mill, fastened to the floor by means of screws merely for the purpose of keeping them in place, and removable without injury to the building or to themselves, are personalty. *Murdock v. Gifford*, 18 N. Y. 28. But see *Murdock v. Harris*, 20 Barb. (N. Y.) 407. But machinery necessary to the use of the building, and for the purpose to which it is devoted, is covered by a mortgage of the real estate. *William Firth Co. v. South Carolina Loan & Trust Co.* (C. C. A.) 122 Fed. 569. Steam engine, boilers, shafting, belting, couplings, and pulleys used to communicate the power, the water wheels and water-wheel governors, the gas generator and gas pump connected with it, the gas pipes and burners, and the steam heating pipes in a mill were held to pass by the

nection with the business carried on. The fact that machinery of this character can be moved easily without injury to the

mortgage of the realty. But not spinning frames, twisting frames, and like machinery, though fastened to the floor by nails or screws, or held in position by cleats. *Keeler v. Keeler*, 31 N. J. Eq. 181.

Electric light machinery: Machinery placed in a building for the purpose of supplying it with electric light, physically annexed to the realty, but with no intention to make it a part thereof, is not included within the mortgaged premises. *Vail v. Weaver*, 132 Pa. 363, 19 Atl. 138. Dynamos and exciters in an electric light plant are a part of the realty, though removable without injury to the building in which they are placed. *New York Security & Trust Co. v. Saratoga Gas & Electric Light Co.*, 88 Hun, 569, 34 N. Y. Supp. 890. Dynamos and engines used in connection with the electric lighting system of a building, for no other purpose than to supply electricity for the building, and removable without injury to themselves or to the building, do not pass under a prior mortgage, as against a purchaser of such machinery from the mortgagor. *New York Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229. The wires of an electric light company, used for the purpose of lighting the city, pass with a mortgage of the company's lot of land, and the machinery situated thereon. *Fechet v. Drake (Ariz.)* 12 Pac. 694.

Machinery in factories: Machinery used in and necessary for the operation of a sash, door, and planing mill, and attached to the building by screws, bolts, pulleys, and bands, is a part of the realty as between mortgagor and mortgagee. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851. Machinery in an agricultural implement factory, either fastened to the building, or heavy enough to remain in place without fastening, and connected with the motive power by belting and gearing, is a parcel of the freehold. *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249. Machinery set in brick, and run by steam, and used as a cotton-seed oil factory is a part of the realty. *Theurer v. Nautre*, 23 La. Ann. 749. Heavy machines in a factory, consisting of lathes, a planer, and drill, steadied by being screwed to the floor, and connected with the shafting, but removable without injury to the building, are not part of the realty. *Hubbell v. East-Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446.

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structure or plant in which it is placed, and the fact that it is susceptible of a like use elsewhere, are potent factors in

As between partners and their mortgagee, machinery upon the premises of a factory is part of the realty. *Stanhope v. Suplee*, 2 Brewst. (Pa.) 455. But machines in a planing and molding mill, separately constructed, and adapted for use in any building in which they can be put, secured in position by bolts, screws, nails, or cleats, and capable of removal without injury to themselves or to the building, are not a part of the realty. *Maguire v. Park*, 140 Mass. 21, 1 N. E. 750. So, in a sash and blind factory, a molding machine, bolted to the floor, and a planing machine, retained in position by its own weight, upon which a chattel mortgage had been given subsequent to the execution of the real-estate mortgage, were held to be personalty. *Blancke v. Rogers*, 26 N. J. Eq. 563. Likewise, in a sash and blind factory, a planer and matcher and a molder, each weighing nearly two tons, retained in position upon the floor by their weight, were not a part of the realty. *Rogers v. Brokaw*, 25 N. J. Eq. 496. But machinery in a keg factory, firmly fastened to the building, is a part of the mortgaged premises. *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58. Machinery in a calico factory, intended for use in the business, passes with the mortgaged premises, even though not attached to the building so as to injure it by removal. *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350. So, nail machines, shears, scouring machines, etc., in a nail factory. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452. Machinery necessary for and used in the operation of a sash, door, and planing mill, when affixed to the building by screws, bolts, pulleys, and bands, is a part of the realty. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851. Machinery in a bedstead manufactory and a grist mill, consisting of a planing machine, a machine for screws, a turning lathe, a circular saw and frame, and a boring machine, spiked to the floor, studs, or posts of the building, but removable without injury to the freehold, is personalty. *Fullam v. Stearns*, 30 Vt. 443. Machinery, such as planers, molders, belting, and shafting annexed to a mill for manufacturing purposes, and intended to be permanently used with the building, becomes part of the realty, though it may be removed without injury to itself or to the building. *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420. An embossing press,

determining such machinery personality.^{25a} Likewise, the same general principles apply to machinery upon farms and other lands.²⁶

weighing about 5,000 pounds, and standing on the floor of a felt factory, without other attachment to the realty than a steam pipe of small diameter, extending from the press to another portion of the factory across the road, and used only for heating purposes, was held personality. *Pope v. Jackson*, 65 Me. 162. Machines for stripping, rolling, splitting, or stitching leather, though bolted to the building, are not a part of the mortgaged premises. *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12. An iron table in a plate-glass factory, weighing thirty-three tons, resting on brick foundations, and adapted only for the use of the factory, is a part of the realty, even though removable without injury to the foundation or to itself. *Smith Paper Co. v. Servin*, 130 Mass. 511. Machinery in a paper mill, fastened down by means of iron bolts passing through the floor and other timbers beneath the floor, is a part of the mortgaged premises, even though removable without injury to the building or to itself, and capable of use elsewhere. *Lathrop v. Blake*, 23 N. H. 46. Machinery and tools in a gas plant are a part of the realty. *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558, 2 N. E. 892. Mill machines, grindstones, pair of shears, scouring machines, nail bins, all used in the manufacture of nails, all more or less permanently

^{25a} See ante, note 25.

²⁶ Machinery upon farms: An acme oil engine, cider mill, grinder, presses, paring machines, belts, and shafting in a grist mill are a part of the mortgaged premises. *Hathaway v. Orient Ins. Co.*, 58 Hun, 602, 11 N. Y. Supp. 413. Machinery placed on mortgaged land subsequently to the execution of the mortgage is subject to lien of the mortgage. *Seedhouse v. Broward*, 34 Fla. 509, 16 So. 425. An engine and machinery in and attached to a sugar house are a part of the mortgaged premises. *Citizens' Bank v. Knapp*, 22 La. Ann. 117.

A portable steam saw mill, including the boiler, engine, and other machinery, attached to the real estate only to the extent necessary to steady the machinery, are not a part of the mortgaged premises. *Taylor v. Watkins*, 62 Ind. 511.

§ 64. Buildings.

Buildings erected upon mortgaged premises have uniformly been treated as a part of the realty.²⁷ Thus, the rule ap-

fastened to the building, are a part of the realty. So, a duplicate cylinder for a bluing machine, and duplicate pulleys for the grindstones, kept on hand for emergencies, but never used. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452. All things used in a factory which are part of the machinery necessary to the process of manufacture are covered by a mortgage of the factory. *Huston v. Clark*, 162 Pa. 435, 29 Atl. 866. So, in a fruit-canning factory, the entire machinery, including articles such as crates, capping machines, and work tables, not actually annexed, but necessary to the working of the machinery, pass under a mortgage of the premises. *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901.

Machinery in a flour and grist mill: Milling machinery placed in a mill building by the owner for the permanent purposes of the mill, so that its removal would injure the building and impair its usefulness for mill purposes, and lessen its value as real estate, is a part of the realty, as between the owner and a mortgagee of the realty; and the fact that the owner subsequently gave a chattel mortgage on such machinery, and that the mortgage was assigned to a third person, and by the latter to the mortgagor, only restores him to his original rights, and gives him no better title than he pre-

²⁷ Buildings: A wooden opera house, which rests on sills on the ground, the roof being supported by the sides, and by iron columns on stone and wood foundation, the base of the stage and furnace of which are in excavations made for the purpose, is a part of the realty. *Miles v. McNaughton*, 111 Mich. 350, 69 N. W. 481. A building erected for a steam saw mill, and of comparatively little value apart from the mill, is a part of the realty. *Brennan v. Whitaker*, 15 Ohio St. 446. A house and lot are a part of the mortgaged premises. *Dorr v. Dudderar*, 88 Ill. 107. A frame building resting upon posts set into the ground is a part of the mortgaged premises. *Wight v. Gray*, 73 Me. 297. A small frame building, 14x12, is a part of the mortgaged premises. *Cole v. Stewart*, 11 Cush. (Mass.) 181.

plies to a temporary dwelling house erected by the mortgagor for use until the permanent dwelling was finished,²⁸ to a

viously had. *Phoenix Mills v. Miller*, 62 Hun, 621, 17 N. Y. Supp. 158. Defendant and his partner put into a certain mill new machinery, which was paid for partly in cash furnished by the defendant under the partnership agreement, and partly with notes of the firm. None of the machinery was built into the mill, but it was attached by cleats, screws, and, in some instances, by braces. Held, that such machinery did not become fixtures, so as to pass under a mortgage by defendant of his interest in the mill. *Borland v. Hahn*, 70 Hun, 597, 25 N. Y. Supp. 131. A grist mill and the machinery therein are a part of the realty. *Pettengill v. Evans*, 5 N. H. 54.

Machinery in a machine shop, foundry, or iron mill: Machines, pulleys, and shaftings bolted or screwed to the building, or to blocks bolted to the building, and all essential parts of the machinery, are a part of the realty, but not machines which are not fastened to the floor, and are supported by their own weight. *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310. Machinery in a foundry and machine shop is covered by a mortgage of the real estate, even though some of the machines were not fastened to the soil because not necessary, on account of their weight. *Smith v. Blake*, 96 Mich. 542, 55 N. W. 978. A mortgage of a machine shop carries with it all its fixed machinery. *Hoskin v. Woodward*, 45 Pa. 42. Heavy machine adapted for use in a machine shop, being fastened to the floor by screws, is a part of the freehold. *Southbridge Sav. Bank v. Stevens Tool Co.*, 130 Mass. 547. See, also, *Roddy v. Brick*, 42 N. J. Eq. 218; *Lackas v. Bahl*, 43 Wis. 53. *Hoskin v. Woodward*, 45 Pa. 42. A mortgage of a lot and iron rolling mill carries with it the iron rollers used in the mill, as well as the duplicates temporarily detached to make

²⁸ So, a temporary dwelling house erected by a mortgagor, to be used by him until the permanent dwelling should be finished, was held a part of the realty. *Butler v. Page*, 7 Metc. (Mass.) 40, 39 Am. Dec. 757. So, as to a barn erected upon the mortgaged premises after the law day is passed, and before foreclosure. *Preston v. Briggs*, 16 Vt. 124.

frame building erected by the mortgagor with the intention of removing it,²⁹ and to a house built by the mortgagor after foreclosure;³⁰ but not to a building erected by a partnership for trade purposes, in no way attached to the freehold.³¹

room for such as were in use. *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116.

Machinery in a saw mill: A shingle machine in a mill is a part of the realty. *Corliss v. McLagin*, 29 Me. 115. A clapboard machine and a shingle machine, fastened into a saw mill, are a part of the mortgaged premises. *Trull v. Fuller*, 28 Me. 545. Mill saws, etc., actually attached in a saw mill, are a part of the freehold. *Burnside v. Twitchell*, 43 N. H. 395; *Brennan v. Whitaker*, 15 Ohio St. 446; *Washington Nat. Bank of Seattle v. Smith*, 15 Wash. 160; *Clark v. Hill*, 117 N. C. 11. But a shingle machine, not fastened to the building, except so far as was necessary to keep it in place, is not a part of the mortgaged premises. *Wells v. Maples*, 15 Hun (N. Y.) 90.

Miscellaneous: A kettle in a fulling mill, used for dyeing cloth, and set in brickwork, is a part of the realty. *Union Bank v. Emerson*, 15 Mass. 159. But a copper boiler, built in with brick and mortar, in a tan yard, is personalty. *Hunt v. Mullanphy*, 1 Mo. 508. Machinery in a slaughter house is a part of the realty. *Kloess v. Katt*, 40 Ill. App. 99.

²⁹ A frame building erected by the side of a mill, upon wooden blocks placed upon the surface of the ground, and intended for use as an office in connection with the mill, is part of the realty as between mortgagor and mortgagee, even though the intention was to ultimately remove it. *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310.

³⁰ Where a mortgagor, while the owner of the equity of redemption, erected a house upon the mortgaged premises without any agreement with the mortgagee, the same became a part of the realty, and passed with it to the purchaser of the mortgage. *Matzon v. Griffin*, 78 Ill. 477. But see *Clark v. Reyburn*, 1 Kan. 281.

³¹ But a building erected by a partnership for trade purposes, and in no way attached to the freehold, but simply resting upon blocks

§ 65. **House fixtures.**

Fixtures in a house, such as furnaces, steam-heating apparatus, windows, doors, blinds, and other chattels attached to the freehold in such a manner as to show an intention to permanently devote them to the use put, are generally considered a part of the mortgaged premises;³² but curtains, carpets,

on the surface of the ground, is personalty. *Kelly v. Austin*, 46 Ill. 156.

³² **Furnaces and stoves:** A hot-air furnace in a dwelling, which is set on a cement base in the cellar, and has pipes that slip on collars on the casing of the furnace, and extend therefrom to different parts of the house, and which was put into the dwelling for permanent improvement, is part of the mortgaged premises. *Pratt v. Baker*, 92 Hun, 331, 36 N. Y. Supp. 928. Portable iron furnace for heating a church, and standing on the cellar floor, and held in position by its own weight, and capable of being detached without injury to the building, is personalty. *Rahway Sav. Inst. v. Irving St. Baptist Church*, 36 N. J. Eq. 61. But a furnace so placed in a house that it could not be removed without disturbing the brickwork of the house adjoining the furnace is a part of the realty. *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273. A portable iron furnace, set upon a brick foundation, with pipes and flues attached, which were placed in a house by a mortgagor while owning the equity of redemption, is not a part of the realty. *Allen v. Mooney*, 130 Mass. 155. See *Kerby v. Clapp*, 15 App. Div. (N. Y.) 37; *Manning v. Ogden*, 70 Hun (N. Y.) 399; *Heysham v. Dettre*, 89 Pa. 506; *Harmony Bldg. Ass'n v. Berger*, 99 Pa. 320. Ranges attached to a gas supply pipe, and connected with a flue, are personalty, *Cosgrove v. Troesch*, 62 App. Div. 123, 70 N. Y. Supp. 764. So, as between mortgagor and mortgagee, ordinary kitchen ranges, placed in an apartment house under a contract of conditional sale, and not attached to the building otherwise than by stovepipes and water pipes leading to a detachable hot-water reservoir, are not a part of the realty. *Jennings v. Vahey* (Mass.; 1903) 66 N. E. 598.

Steam heating apparatus: A steam heating plant, consisting of a furnace and boiler placed in the basement of the house, with iron pipes leading throughout the house, passing through the floors and

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window shades, and other articles of mere furniture are personalty.³³

§ 66. Store, hotel, or office fixtures.

In a hotel office, steam radiators attached to steam pipes on the floors by being screwed to those pipes, and an electric annunciator attached to the wall, are a part of the realty.³⁴ So, electric light fixtures in a hotel pass with the realty.³⁵ Likewise, in a building occupied as a saloon and hotel, a bar consisting of a counter and "back bar," the one fastened to the floor, and the other to the wall of the building by nails and screws, is a part of the mortgaged premises.³⁶ So, in a dry-

walls into rooms above, and attached to radiators, are a part of the realty as between mortgagor and mortgagee. *Tyler v. White*, 68 Mo. App. 607. Steam heating pipes laid on hooks attached to boards fastened to the walls are part of the real estate. *Keeler v. Keeler*, 31 N. J. Eq. 181. But in *National Bank of Catasaqua v. North*, 160 Pa. 311, steam radiators were held personalty, as being analogous to gas fixtures.

Pictures painted on canvas, and cemented to the ceiling, are subject to the lien of a mortgage. *Cahn v. Hewsey*, 8 Misc. Rep. 384, 31 Abb. N. C. 387, 29 N. Y. Supp. 1107.

³³ **Curtains, carpets, etc.:** Carpets and window shades are movables, as between mortgagor and mortgagee. *Cosgrove v. Troesch*, 62 App. Div. 123, 70 N. Y. Supp. 764. Curtains, window screens, screen doors, a table or sideboard, a hot-water tank, globes for electric and gas lights and electric light fixtures are personalty. *Hall v. Law Guarantee & Trust Soc.*, 22 Wash. 305, 60 Pac. 643. Mirrors supported by hooks driven into the walls are not a part of the mortgaged premises. *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471.

³⁴ *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257.

³⁵ *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1033.

³⁶ *Woodham v. First Nat. Bank of Crookston*, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622. So, a hotel sign, fastened to the arm of a post set in the street several feet from the front line of the

goods store, drawers of wood flush with the plastering of the building are a part of the real estate.³⁷ Likewise, in an auditorium, upholstered turnover theater chairs, arranged in the usual manner of seating such places, and fastened to the floor by screws, have been held a part of the mortgaged premises.³⁸ But shelving and counters in a store, even though nailed to the building, and necessary for the use of the premises as a store, are not a part of the mortgaged premises, in the absence of an intention on the part of the owner of the building to treat them as fixtures.³⁹ Gas fixtures have uniformly been held to be personalty.⁴⁰

lot belonging to the hotel, and placed several feet in the ground, and secured by a band of iron spiked to the sidewalk, has been held a part of the realty. *Redlon v. Barker*, 4 Kan. 445.

³⁷ *Connor v. Squiers*, 50 Vt. 680. But not a show case, with drawers and sash, though fastened in place by nails. *Cross v. Marston*, 17 Vt. 533, 44 Am. Dec. 353. So, not a safe in a bank, even though bricked in. *Moody v. Aiken*, 50 Tex. 65.

³⁸ *New York Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229.

³⁹ *Johnson v. Mosher*, 82 Iowa. 29, 47 N. W. 996.

⁴⁰ **Gas fixtures:** Gas fixtures attached to gas pipes where they come out of the wall, mantel mirrors hung on hooks driven into the wall, and pier mirrors resting on a casing at the bottom, and attached to a holdfast at the top, which was driven into the wall, are personalty, as between mortgagor and mortgagee. *McKeage v. Hanover Fire Ins. Co.*, 16 Hun (N. Y.) 239, affirmed in 81 N. Y. 38. Gas chandeliers and a pendant gas burner, attached by screws to a small pipe that conveys gas into a dwelling house, and removable without injury to the pipe or the building, are personalty. *Montague v. Dent*, 10 Rich. Law (S. C.) 135, 67 Am. Dec. 572. So, gas pipes laid in through the streets of a city are not a part of the realty. *Memphis Gas Light Co. v. State*, 6 Cold. (46 Tenn.) 310, 98 Am. Dec. 452. But see, to the contrary, *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621. But gas burners, a gas pump, and generator in a gas plant are a part of the realty. *Keeler v. Keeler*, 31 N. J. Eq. 191. See ante, § 53, "Gas Fixtures."

§ 67. Farm fixtures.

Platform scales, fastened to sills laid upon a brick wall, set in the ground for weighing stock and grain, and intended for permanent use, are a part of the realty, as between mortgagor and mortgagee.⁴¹ Nursery trees and shrubs planted for the temporary purpose of cultivation and growth until fit for the market are a part of the mortgaged premises.⁴² The fact that the mortgagor is a nursery man, and that the trees and shrubs are his stock in trade, does not alter the rule.⁴³ And they pass with the mortgage of the land, even though planted by the mortgagor after the execution of the mortgage.⁴⁴ So, manure made in the ordinary course of husbandry upon a farm passes with a mortgage of the premises.⁴⁵ But a portable steam saw mill, boiler, and engine not attached to the soil, and easily moved from place to place, are not a part of the realty as between mortgagor and mortgagee.⁴⁶ So, a mortgage of a plantation does not include the wagons and tools used upon it, or the stock and cattle.⁴⁷

⁴¹ *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260. But platform scales set upon a brick foundation, which was let down into the ground of a public street, permission having first been obtained from the village council, are not a part of the realty. *O'Donnell v. Burroughs*, 55 Minn. 91, 56 N. W. 579.

⁴² *Maples v. Millon*, 31 Conn. 598; *Dubois v. Bowles*, 30 Colo. 44; *Adams v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487.

⁴³ *Maples v. Millon*, 31 Conn. 598.

⁴⁴ *Price v. Brayton*, 19 Iowa, 309.

⁴⁵ *Chase v. Wingate*, 68 Me. 204, 28 Am. Rep. 36. See, also, *Fay v. Muzzey*, 13 Gray (Mass.) 53, 74 Am. Dec. 619; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Norton v. Craig*, 68 Me. 275. See ante, § 36a, "Manure."

⁴⁶ *Taylor v. Watkins*, 62 Ind. 511.

⁴⁷ *Vason v. Ball*, 56 Ga. 268.

Hop poles upon a farm are a part of the realty as between mortgagor and mortgagee.⁴⁸

§ 68. As affected by agreement of the parties.

The general rule announced in respect to fixtures as between mortgagor and mortgagee may be changed or otherwise modified by the agreement of the parties.⁴⁹ This may be manifested by provisions in a mortgage, or it may be the subject of a distinct contract.

—— (a) Construction of the terms of a mortgage.

The general rules of interpretation and construction of contracts are applied to the terms of the mortgage in respect to fixtures.⁵⁰ A simple mortgage of the freehold, describ-

⁴⁸ *Sullivan v. Toole*, 26 Hun (N. Y.) 203.

⁴⁹ See chapter 5, note 1, "Agreements as to the Character of Fixtures."

In *Hill v. Sewald*, 53 Pa. 271, it was agreed between the mortgagor and the mortgagee that the boilers put into a steam mill after the execution of a mortgage upon the mill and ground on which it stood should not be subject to the mortgage, and it was held that, by the agreement, the boilers remained personalty. But the fact that a mill and fixtures are excepted from the operation of a mortgage of the land on which they stand does not necessarily deprive them of their character as realty. *Davis' Adm'r v. Eastham*, 81 Ky. 116; *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Where a partner annexed apparatus for distillery purposes, including a mash tub and three fermenting tanks, to real estate owned by the other partner, under the agreement that it should remain the property of the former partner, and the property was subsequently mortgaged to a mortgagee, who knew these facts, it was held that the articles were not a part of the real estate. *Walker v. Schindel*, 58 Md. 360.

⁵⁰ See 17 Am. & Eng. Enc. Law (2d Ed.), on "Interpretation and Construction."

ing the property conveyed by metes and bounds, or by a general description, carries with it all chattels that would be termed in law a part of the realty, in accordance with the recognized tests of fixtures.⁵¹ But a mortgage of the realty conveying, by some specific description, a mill or manufacturing establishment, *eo nomine*, has been held to pass with it all articles which are fitted, adapted, and essential to the mill or manufacturing establishment.⁵² Thus, the mortgage

⁵¹ Where the conveyance of land is by metes and bounds, and on the land a building stands, in which is the thing in controversy, it will pass or not, according as the thing is or is not, in law, a part of the realty. *Murdock v. Gifford*, 18 N. Y. 31.

The owner of a twine factory conveyed the same by a description of the land upon which it was situated, and took back a mortgage containing the same description. Held, that the mortgage covered the factory and the machinery therein. *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489. See *Fortman v. Goepper*, 14 Ohio St. 558; *Zeller v. Adam*, 30 N. J. Eq. 421; *Morris' Appeal*, 88 Pa. 368; *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Theurer v. Nautre*, 23 La. Ann. 749.

A mortgage of land, "with the buildings and improvements thereon erected," does not cover heavy ornamental vases standing in the garden of the house on the premises, and not in any way attached to the soil, nor a stepping stone on the sidewalk in front of such premises, since such articles cannot, as a matter of law, be held to be improvements. *Pfluger v. Carmichael*, 54 App. Div. 153, 66 N. Y. Supp. 417.

⁵² In the case of *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, the court said: "It is true that, where a manufactory or a mill is conveyed or delivered by any general name or description which embraces all its essential parts as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not. Thus, things personal in their nature, but fitted and adapted to be used with real estate, and essential to its beneficial enjoyment in such use, may pass with the realty by a conveyance and delivery under such a description, which

of a machine shop includes all the fixed elements or machinery that give to it its peculiar character as a machine

would not pass by an ordinary conveyance of the land with its appurtenances." But in this case, an addition to the description of the mortgaged premises, "on which is erected a woolen manufactory," was held merely descriptive of the realty.

So, in *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490, a mortgage on certain premises, described as "a lot of ground, with one iron rolling mill establishment situated thereon, with the buildings, apparatus, steam engines, boilers, bellows, etc., attached to said establishment," passed iron rolls in the mill, and the court held that, even if the rolls were chattels, the word "apparatus" in the description would have carried them with the mortgage.

In *Hunt v. Mullanphy*, 1 Mo. 508, the court said: "If, then, a lot were conveyed by a general description as so much land, bounded in a particular manner, without saying anything further, the grantor would still be allowed to remove everything which might be severed without violence to the freehold, which has been placed there for the purpose of trade. But if the deed conveyed the land, together with the manufactory thereon, the evident intention of the parties would be that everything annexed to the freehold which was necessary to carry on the manufactory should pass, and would pass accordingly."

In the conveyance, by mortgage or otherwise, of a factory or mill by any general name or description, with all its machinery, fixtures, and tools, such a factory or mill, with all its machinery and fixtures, and all necessary parts of the establishment, however slightly annexed, will pass with the freehold by such description. And things ordinarily personal in their nature, but fitted and adapted to be used with the real estate, and necessary for its beneficial enjoyment in the character in which conveyed, will pass with the freehold by such description, which would not pass by an ordinary conveyance of land with its appurtenances. It is because of the intention evinced by such description and such terms that the mill passes. *Potts v. New Jersey Arms & Ordnance Co.*, 17 N. J. Eq. 404.

But a mortgage of certain town lots, described by metes and bounds, and followed by the words: "Said lot or parcel of land embracing the factory building used as a cotton mill, also the canal

shop.⁵³ So, the enumeration of specific chattels in a mortgage carries such chattels with the premises.⁵⁴

The use of the term "fixtures" in a mortgage apparently includes not only irremovable fixtures, but also those fixtures that would be termed "removable."⁵⁵ So, the use of the term "apparatus" in a mortgage embraces articles of machinery that might be termed personalty.⁵⁶ But the use of special terms in a description of the mortgaged premises may exclude from the operation of the mortgage certain fix-

or race conducting the water to the wheel propelling the machinery of the said cotton mill," was held to pass only such machinery so annexed as to be part of the realty. *Rogers v. Prattville Mfg. Co.* No. 1, 81 Ala. 483.

⁵³ *Hoskin v. Woodward*, 45 Pa. 42. So, the mortgage of a mill passes the stones, tackling, and implements necessary for working it. *Place v. Fagg*, 4 Man. & R. 277. So, a mortgage of a sugar house carries with it the engine and machinery attached. *Citizens' Bank v. Knapp*, 22 La. Ann. 117.

⁵⁴ The mortgage of a silk mill, with all the steam engines, boilers, steam pipes, main shafting, mill gearing, millwright's work, and other machinery and fixtures whatsoever being, or which should thereafter be, on the land described in the mortgage, was held to pass all the chattels specified, together with silk-spinning machines attached to the floor, simply by the force of gravity. *Haley v. Hammersley* (1861) 3 De Gex, F. & J. 587, 30 Law J. Ch. 771, 4 Law T. (N. S.) 269, 7 Jur. (N. S.) 765, 9 Wkly. Rep. 562.

⁵⁵ *Pickerell v. Carson*, 8 Iowa, 544; *McGorrick v. Dwyer*, 78 Iowa, 279, 16 Am. St. Rep. 440.

In *Sawyer v. Long*, 86 Me. 541, the term "fixtures," used in a mortgage, was held to apply to store appliances which could be removed from the realty.

A mortgage conveying land, on which was a grist mill, "with all the fixtures," was held to pass an acme oil engine, cider mill, grinder, presses, paring machines, belts, shafting, and a pease slicer. *Hathaway v. Orient Ins. Co.*, 58 Hun, 602, 11 N. Y. Supp. 413.

⁵⁶ *Farrar v. Stackpole*, 6 Me. 154.

tures, which would be legally termed a part of the realty, for the reason that they are not embraced within the special description, and hence the maxim applies, *Expressio unius est exclusio alterius*.⁵⁷

— (b) Collateral agreement.

The parties, by an agreement extrinsic and collateral to the mortgage, may treat chattels annexed as personalty or realty.⁵⁸ Thus, the giving of a bill of sale or a chattel mortgage on articles annexed to the realty at the same time as the execution and delivery of the mortgage has been held to show an intention that the articles should be treated as personalty;⁵⁹ but where this is done for the purpose of guarding

⁵⁷ Where a mortgage described the premises conveyed as an iron foundry and two dwelling houses, etc., and the appurtenances thereunto belonging, together with all grates, boilers, belts, and other fixtures in and about the two dwelling houses, and the brew houses thereto belonging, it was held that the maxim "*Expressio unius est exclusio alterius*" applied, and that cranes, presses, and a steam engine used in the foundry for the purposes of the business did not pass, though they would have passed had not the others been enumerated. *Hare v. Horton*, 5 Barn. & Adol. 715.

⁵⁸ Where a mortgagor conveyed, by a warranty deed intended as a mortgage, certain land, together with the steam mill, fixtures, machinery, and buildings, and the mortgagor removed from the premises certain machinery of the steam mill, with the knowledge of the mortgagee, and with his assent, that certain machinery in the planing mill, if left, should not be covered by the mortgage, and where the mortgagee received reimbursement from the mortgagor for taxes paid upon such machinery, it was held that the mortgagee had waived his right to claim such machinery as realty. *Foster v. Prentiss*, 75 Me. 279.

⁵⁹ Where mill property, containing machinery adapted to its use, was conveyed, and a mortgage taken back for the purchase price, and where the grantor, at the same time, gave a bill of sale of the
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against mistake, the character of the annexed chattels is not thereby changed as between the parties.⁶⁰

machinery, and took back a chattel mortgage upon the same, it was held that the chattel mortgage did not change the character of the machinery. *Cooper v. Harvey*, 62 Hun, 618, 16 N. Y. Supp. 660.

So, in *Morris' Appeal*, 88 Pa. 368, in the case of a purchase-price mortgage, where the mortgagee had conveyed part of the machinery to the purchaser by a bill of sale, and had taken a mortgage back which expressly included the fixtures in a manufacturing plant, it was held that all such fixtures were realty.

So, in *Cooper v. Harvey*, 62 Hun, 618, 16 N. Y. Supp. 660, where mill property containing machinery was conveyed, and a purchase-money mortgage given, the vendor at the same time giving a bill of sale of the machinery, and taking back a chattel mortgage thereon, it was held that the machinery passed as realty by conveyance, and was included in the mortgage of the real estate.

Where the owner of certain machinery entered into a written contract with a mining company to set up machinery on the land of the latter, and to take notes therefor secured by a mortgage on the machinery, and on the same day the mining company executed a mortgage on the land, containing a clause that it was subject to a mortgage, it was held that the intention was that the property should remain personalty, and hence not subject to a real-estate mortgage. *Ellison v. Salem Coal & Mining Co.*, 43 Ill. App. 120.

In *Wheeler v. Bedell*, 40 Mich. 696, it was held that a chattel mortgage given upon a planing machine, which weighed about three tons, and was fastened to the floor of the building at each end with cleats and bolts, and was situated upon land which had been previously mortgaged, rendered the machine personalty, as between a real-estate mortgagee and a chattel mortgagee. See, also, *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899. So, the execution of a chattel mortgage upon machinery in a saw mill renders it personalty as between the chattel mortgagor and chattel mortgagee. *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. 513. See, also, *Burrill v. Wilcox Lumber Co.*, 65 Mich. 571, 32 N. W. 824; *Folsom v. Moore*, 19 Me. 252; *Zeller v. Adam*, 30 N. J. Eq. 421; *Fortman v. Goepper*, 14 Ohio St. 558.

⁶⁰ Though a chattel mortgage on fixtures is evidence that they

—— (c) **Parol reservation.**

A parol agreement between the mortgagor and mortgagee, treating certain annexed chattels as personalty, and not a part of the mortgaged premises, has generally been held ineffective for the reason that it violates a familiar rule of evidence that parol contemporaneous evidence is inadmissible to vary the terms of a valid written instrument.⁶¹

are not permanently annexed, it does not conclusively fix their character as personal property when given concurrently with a real-estate mortgage covering the same property for the purpose of an insurance against the possible mistake as to their character. *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426.

So, in *Homestead Land Co. v. Becker*, 96 Wis. 210, it was held that the contemporaneous execution of a chattel mortgage upon machinery firmly fastened in a tack and nail factory, along with a real-estate mortgage, to secure the same debt, did not operate per se to impress upon such property the character of personalty. See, also, *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765; *Miles v. McNaughton*, 111 Mich. 350, 69 N. W. 481; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489.

⁶¹ *Leonard v. Clough*, 59 Hun, 627, 14 N. Y. Supp. 339; *Bond v. Coke*, 71 N. C. 97; *Horne v. Smith*, 105 N. C. 322, 18 Am. St. Rep. 903.

In *Smith v. Price*, 39 Ill. 30, where there was a contemporaneous parol reservation between the vendor and vendee to the effect that certain fruit trees and ornamental shrubbery for nursery purposes should not pass by the deed, the court held that it would be a violation of the most familiar rules of evidence to receive proof of such a parol agreement; and while, as between landlord and tenant, such trees and shrubbery would be personalty, as between vendor and vendee, such articles are realty. But an agreement made contemporaneously with the executor of a mortgage upon a machine shop, and the realty upon which the same was situated, that the patterns, tools, and movable fixtures of said shop should not be regarded as a part of the mortgaged premises, was held admissible. *Frederick v. Devol*, 15 Ind. 357.

So, in *Pea v. Pea*, 35 Ind. 398, it was held that a parol agreement

§ 69. As affected by custom.

Ordinarily, the existence of a custom in regard to certain fixtures cannot control the operation of a mortgage deed of land upon which they are situated, for there is a written contract between the parties which defines their rights.⁶²

§ 70. As affecting third persons claiming under the mortgagor generally.

In the absence of any agreement, the general rule of law in regard to fixtures as between mortgagor and mortgagee is applicable to third parties claiming under a mortgage as against a mortgagee, or *vice versa*.⁶³ But where there is

reserving to the grantor, at the time of the execution of the deed, a certain mill, boiler, engine, etc., in a saw mill, was valid. The court said: "Suppose there had been upon the land conveyed by the appellant to the decedent, a large steam flouring mill, firmly and securely attached to the land. In such a case there would be much less reason, if any, for permitting a parol reservation than in the case under consideration, where the saw mill had much slighter attachments, and, as is shown by the evidence, was removed from place to place. While it was a fixture, it cannot be regarded as a permanent one, as in the case of the steam flouring mill, but was intended to be removed from point to point, it being more convenient to remove the mill than to haul the saw logs to the mill. We think, under these circumstances, there may have been a reservation by parol."

⁶² Roxburghe v. Robertson, 2 Bligh, 156; Martyr v. Bradley, 9 Bing. 24; see note 33, c. 6, supra. But in Choate v. Kimball, 56 Ark. 55, it was held that a custom to put certain articles upon the land for temporary use, and to remove them when desirable, prevented them from becoming fixtures as between mortgagor and mortgagee, since there was an absence of intention necessary to make them a part of the realty. See, also, Bemis v. First Nat. Bank, 63 Ark. 625.

See ante, § 69, "As Affected by Custom."

⁶³ See supra, this chapter, § 58.

an agreement between a third party and a mortgagor or mortgagee respecting the character of certain annexed chattels, and the rights of innocent parties are involved, the decisions are not in harmony as to the relative rights of the parties.

— (a) **As between conditional vendor or chattel mortgagee of fixtures and mortgagee of the realty.**

By far the greater number of cases under this head have arisen between a conditional vendor or chattel mortgagee of chattels annexed and a mortgagee of the realty, where the vendor has sold chattels to the mortgagor, to be annexed to the realty, and has either taken a chattel mortgage or retained the title to the chattels in himself to secure the purchase price. Where the mortgagee has notice of such an agreement, or is a party to the transaction, the undoubted rule is that the mortgagee neither occupies any position better than, nor possesses any equities superior to, the immediate parties to the agreement.⁶⁴ Thus, a mortgagee of real property who has actual notice of a chattel mortgage upon articles which are subsequently affixed to the mortgaged realty cannot claim the chattels so annexed as against the chattel mortgagee.⁶⁵ But, in this connection, constructive notice is not given to a mortgagee of the realty in respect to an existing chattel mort-

⁶⁴ Machinery placed in a building under an agreement that the title shall remain in the vendor until they are paid for is personalty, as against a mortgagee of the realty with notice. *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14. See, also, *Warner v. Kenning*, 25 Minn. 173. See, also, *Bartholomew v. Hamilton*, 105 Mass. 239; *Frederick v. Devol*, 15 Ind. 357; *Taft v. Stetson*, 117 Mass. 471; *Foster v. Prentiss*, 75 Me. 279.

⁶⁵ *Rowland v. West*, 62 Hun (N. Y.) 583.

gage upon articles attached to the realty, by filing and recording the same as a chattel mortgage;⁶⁶ for a purchaser or mortgagee of real estate need only inquire for liens on real estate.⁶⁷ The record of a chattel mortgage is constructive notice only of an incumbrance upon chattels.⁶⁸ But where the mortgagee of the realty is *bona fide*, and without notice, there are two lines of decisions as to the relative rights

⁶⁶ *Brennan v. Whitaker*, 15 Ohio St. 446; *Frankland v. Moulton*, 5 Wis. 1; *Rowland v. West*, 62 Hun (N. Y.) 583; *Fortman v. Goepper*, 14 Ohio St. 558; *Voorhees v. McGinnis*, 48 N. Y. 278. See ante, c. 5, § 29b, "Subsequent Vendees and Mortgagees of the Realty," and notes 43, 44, thereunder.

⁶⁷ "On the question of notice, it is undoubtedly true that, so far as the plaintiff was dealing with real estate in taking her mortgage, she was not affected with notice by the filing of the chattel mortgage. As the court said at the circuit, as a purchaser of real estate, she need only to inquire at the county clerk's office for liens on real estate, and was not required to extend her inquiry to the town clerk's office in search of chattel mortgages." *Rowland v. West*, 62 Hun (N. Y.) 583.

⁶⁸ Thus, in *Brennan v. Whitaker*, 15 Ohio St. 446, where a chattel mortgage was given upon certain boilers, engines, saws, and gearing of a steam saw mill by the owner of the realty before the same were attached to the realty, and, after the articles were annexed to the freehold, a mortgage of the real estate was given to a mortgagee thereof, who was without notice of this chattel mortgage, it was held, as between the chattel mortgagee and the mortgagee of the realty, that the record and filing of the chattel mortgage was constructive notice only of an incumbrance upon chattels, and that it devolved upon the chattel mortgagee, who sought to change the legal character of the chattels after they were annexed to the realty, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or otherwise, to take the risk of its loss in case it should be sold and conveyed as part of the real estate of a purchaser without notice.

of the parties. The so-called Massachusetts rule maintains that a conditional vendor or chattel mortgagee who has permitted chattels sold by him to be incorporated with the realty, and to become a part thereof, cannot assert that they are personalty, in accordance with his agreement with the mortgagor of the realty, as against a *bona fide* mortgagee without notice.⁶⁹ The rule is laid down that the lien of the mort-

⁶⁹ In *Clary v. Owen*, 15 Gray (Mass.) 522, where water wheels sold by a vendor, who retained title thereto to secure the purchase price, were attached to realty previously mortgaged, the court said: "We think it is not in the power of the mortgagor, by any agreement made with the third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold which, as between mortgagor and mortgagee, would become a part of the realty."

Iron rails fastened upon the roadbed of a railroad company, so as to be a part of the realty, by a vendor who has retained the title of the same in himself until they are paid for, are a part of the land as against prior mortgagees of the same. *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

So, in *Thompson v. Vinton*, 121 Mass. 139, it was held that a mortgagor of the realty cannot, by any agreement made as to fixtures thereafter attached, prevent them from becoming subject to the prior real-estate mortgage.

So, an agreement between a vendor and vendee that a boiler, so annexed in a machine shop as to be a part of the realty, shall remain the property of the vendor until paid for, does not affect a subsequent mortgagee of the land without notice. *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542. See, also, *Pierce v. George*, 108 Mass. 78; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105. But ordinary kitchen ranges placed in an apartment house under a contract of conditional sale, do not pass to the mortgagee as a part of the realty as against the conditional vendor. *Jennings v. Vahey* (Mass.; 1903) 66 N. E. 598.

Where the machinery of a manufactory that supplies the motive
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gage covers all that was realty when the mortgagee accepted the security, and all accessions to the realty except when, by a valid agreement to which he is a party, the character of chattels is impressed upon them.⁷⁰ But in several states, particularly in the western states and in those states where a mortgage is considered merely as a personal lien, and not as a conveyance of an estate,⁷¹ the rule above noted is modified in respect to prior mortgages of the real estate.⁷² In this connection there is an evident distinction drawn by the courts of these states between the equities of prior mortgagees and subsequent mortgagees of the realty. As to prior mort-

power, such as the engine, boiler, and attachments, were permanently annexed to foundations resting upon premises which were subsequently mortgaged, as between a chattel mortgagee of the machinery, who has placed his mortgage on record as of chattel property, and the mortgagee of the realty, the machinery is a part of the realty. *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493.

As between a vendor claiming machinery which has been sold to a planter and attached to his plantation, and a mortgagee of the premises, holding under a pre-existing mortgage, the machinery passes with the realty. *W. T. Adams Mach. Co. v. Newman*, 107 La. 702, 32 So. 38.

See *Frankland v. Moulton*, 5 Wis. 1; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 700; *Phoenix Iron-Works Co. v. New York Sec. & Trust Co.*, 28 C. C. A. 76, 83 Fed. 757; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 7 Sup. Ct. 741, 30 L. Ed. 830, 122 U. S. 283, 7 Sup. Ct. 1206, 30 L. Ed. 1210.

⁷⁰ *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698.

⁷¹ 1 Jones, Mortgages, § 59.

⁷² *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279; *Binkleÿ v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Hill v. Sewald*, 53 Pa. 271; *Crippen v. Morrison*, 13 Mich. 23; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655; *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064.

gagees of the realty, the rule is asserted that the prior mortgagee cannot claim, as subject to his mortgage, fixtures annexed subsequently to the execution of the mortgage as against a conditional vendor retaining title to the fixtures until they are paid for, or as against a chattel mortgagee of the same.⁷³ For the prior mortgagee has not been misled by the

⁷³ *Boston Safe-Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 36 Fed. 288; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1.

Alabama: *Warren v. Liddell*, 110 Ala. 232; *Broaddus v. Smith*, 121 Ala. 335, 26 So. 34.

California: *Tibbetts v. Moore*, 23 Cal. 208.

Delaware: *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192.

Illinois: *Andrews v. Chandler*, 27 Ill. App. 103.

Indiana: *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Iowa: *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541.

Kansas: *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345.

Michigan: *Crippen v. Morrison*, 13 Mich. 23; *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389.

Minnesota: *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; *Id.*, 59 Minn. 532, 61 N. W. 680; *Id.*, 62 Minn. 204, 64 N. W. 390; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064.

Nebraska: *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765.

New Jersey: *Roddy v. Brick*, 42 N. J. Eq. 218; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279.

New York: *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537.

North Carolina: *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

Pennsylvania: *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

South Carolina: *Padgett v. Cleveland*, 33 S. C. 339.

Texas: *McJunkin v. Dupree*, 44 Tex. 500.

Vermont: *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *Page v. Edwards*, 64 Vt. 124.

agreement with the conditional vendor or the chattel mortgagee, nor has he advanced anything upon the faith that the fixtures were a part of the realty, nor has his security been impaired by reason of the agreement, and hence he ought not to be permitted to avail himself of the fixtures as a part of his security, contrary to the intention of the party making the annexation.⁷⁴ Then, again, a further equitable reason

Washington: *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

⁷⁴ "It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty; but this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance. But the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence, in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on the part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation." *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn.

is advanced that the mortgage attaches only to such property or interest in property as the mortgagor himself acquires, and therefore chattels that are placed upon land under agreements as aforementioned pass to the prior mortgagee under the same conditions and subject to the same liens as may be enforced against them in the hands of the mortgagor.⁷⁵ This rule is not upheld by the courts of many states, although it appears the more equitable, and to be supported by the weight of authorities.⁷⁶ Thus, in a recent Wisconsin case, the court, in line with its previous decisions, denied the rule above stated, but admitted that it was supported by the weight of authority, and appeared the more equitable.⁷⁷ But as

211, 56 N. W. 823. See, also, the able opinion of the court in *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889. . . *

Machinery placed upon premises subject to a prior existing mortgage held not a part of the realty as between a conditional vendor of the same and a mortgagee of the realty. *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69; *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028.

A planing machine, bolted to the floor of a saw mill, so as to keep it from moving, and which has no connection with the motive power except by a belt over a pulley wheel, is not a part of the realty, as between conditional vendor and mortgagee of the realty to secure a pre-existing debt. *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744. But machinery for a brewery, consisting of a refrigerating plant, placed in a building built for the purpose, is a part of the realty as between a conditional vendor of the same and a subsequent mortgagee of the realty. *Wade v. Donau Brew. Co.*, 10 Wash. 284, 38 Pac. 1009.

⁷⁵ See ante, § 29a, "Prior Mortgagees of the Realty," and note 30 thereunder.

⁷⁶ See *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 702; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. See supra, c. 5, notes 25, 29. Also ante, note 73.

⁷⁷ *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698.

between a subsequent mortgagee of the realty and a conditional vendor or chattel mortgagee of chattels annexed thereto, the so-called Massachusetts rule generally obtains.⁷⁸ As between these parties, it has been said that the question whether the annexed chattel can or cannot be removed without injury to the realty determines whether a fixture shall go to the conditional vendor, or to the mortgagee of the realty.⁷⁹ But this, as a sole test, has been repudiated by many decisions, except in so far as it is a factor in connection with the other tests in determining the legal character of the fixture.⁸⁰

— (b) **As between judgment creditors, licensees, and other parties claiming under the mortgagor and a mortgagee of the realty.**

Parties claiming under the mortgagor, such as judgment creditors, licensees, etc., have been held to occupy the same

⁷⁸ *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765.

See ante, § 29b, "Subsequent Vendees and Mortgagees of the Realty." See, also, note 69, *supra*.

⁷⁹ *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028. See article on fixtures in 52 Cent. Law J. p. 480.

⁸⁰ In *Phoenix Iron Works Co. v. New York Sec. & Trust Co.*, 28 C. C. A. 76, 83 Fed. 757, the court said, in reference to the test of injury by removal, that the determination of the case does not depend upon any narrow question of mere physical injury to the building in the removal of the machinery placed therein. So, in *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446, it was held that the question of injury by removal was immaterial as between these parties. See, also, *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 700.

position as the mortgagor in a contest against a mortgagee as to fixtures.⁸¹

— (c) **As between a lessee of the mortgagor and a prior mortgagee of the realty.**

As against a prior mortgagee of the real estate to which the tenant of the mortgagor has annexed his trade, domestic, or ornamental fixtures, the tenant has the same rights to remove such fixtures as he possesses against the mortgagor, his landlord.⁸²

— (d) **As between a lessee of the mortgagor and a subsequent mortgagee of the realty.**

But as against a subsequent mortgagee of the realty who is *bona fide* and without notice of the rights of a tenant as against his landlord, the mortgagor, the rule is stated that the tenant has no right to remove his trade, domestic, or ornamental fixtures.⁸³ This holding is based upon the idea that a tenant's fixtures are a part of the realty until severed; and in a contest between a *bona fide* subsequent mortgagee of the realty without notice and the lessee, the equities of the parties are at least equal, and the legal rights of the mortgagee are superior.⁸⁴ But in New York, where a lessor mortgages the premises during the existence of a tenancy, the mortgagee occupies the position of the lessor, and the tenant,

⁸¹ Studley v. Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426.

⁸² Ferris v. Quimby, 41 Mich. 202; Belvin v. Raleigh Paper Co., 123 N. C. 138.

⁸³ Landon v. Platt, 34 Conn. 517; Davis v. Buffum, 51 Me. 160; Wing v. Gray, 36 Vt. 261; Jones v. Cooley, 106 Iowa, 165, 76 N. W. 652; Smyth v. Stoddard, 203 Ill. 424.

⁸⁴ First Nat. Bank of Joliet v. Adam, 138 Ill. 483; Landon v. Platt, 34 Conn. 517.

in that case, may remove those fixtures erected by him upon the leased premises which are removable as against his landlord.⁸⁵ In respect to what constitutes notice, it appears that mere possession of the leased premises by the tenant is not sufficient to afford notice to the mortgagee.⁸⁶

— (e) **As between purchaser at foreclosure of the mortgage and mortgagor of the realty.**

The purchaser at foreclosure enjoys the same rights as a mortgagee as against a mortgagor, or those claiming under him.⁸⁷

⁸⁵ *In Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259, where a lessee, having placed machinery upon the leased premises under a provision in the lease so permitting, and where there was a mortgage on the premises executed by the original lessor subsequent to the lease, it was held that the lessee had the right to remove the machinery. The court said: "The defendant, who has derived title to the real estate under a mortgage executed by the lessor subsequent to the lease, and while the tenancy was subsisting, occupies the position of the lessor."

⁸⁶ *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Powers v. Denison*, 30 Vt. 752. See, also, § 43b, "Subsequent Vendees and Mortgagees of the Realty," and notes 112, 113, thereunder.

⁸⁷ *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465; *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. 474; *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780. See ante, notes 42, 43, and chapter 5.

As between a purchaser at a mortgage foreclosure and one claiming under a bill of sale from the mortgagor, a cupola and crane bricked up and built into a building are a part of the realty. *Lord v. Detroit Sav. Bank* (Mich.; 1903) 93 N. W. 1063. But a purchaser at foreclosure acquires no interest in trade fixtures on the premises, even though he had no notice. So held as to a greenhouse and heating apparatus. *Royce v. Latshaw*, 15 Colo. App. 420.

CHAPTER IX.

FIXTURES AS BETWEEN HEIR AND PERSONAL REPRESENTATIVE.

- § 71. General rule.
- 72. Relation of the parties.
- 73. Trade fixtures.
- 74. Domestic and ornamental fixtures.
- 75. Fixtures by devise.
- 76. Machinery.
- 77. Charters.
- 78. Heirlooms.
- 79. Animals *ferae naturae*.

§ 71. General rule.

The general rule in the law of fixtures, that whatever is annexed to the freehold becomes a part thereof, has always been strictly applied, as between heir and personal representative, in favor of the inheritance.¹ As between these parties there are no equitable grounds for treating chattels an-

¹ "In regard to the law of fixtures, between the heir and the executor, the construction has always been more strict in favor of the inheritance. In this relation it seems that nothing which was erected for the permanent use and advantage of the land, and which, at the time of its erection, was intended to remain permanently upon, or attached to, the soil, can ever be removed by the executor. And the same rule, substantially, obtains between grantor and grantee, or vendor and vendee, and equally between mortgagor and mortgagee." 2 Redfield, Wills, 145. See *Elwes v. Maw*, 3 East, 38; *Kinsell v. Billings*, 35 Iowa, 154; *Bainway v. Cobb*, 99 Mass. 457; *Wilson v. Freeman*, 7 Wkly. Notes Cas. (Pa.) 33; *Tuttle v. Robinson*, 33 N. H. 104; *Clark v. Burnside*, 15 Ill. 62. See, also, *Leigh v. Taylor*, 71 Law J. Ch. 272, 86 Law T. 239, 50 Wkly. Rep. 623.

nexed as a part of the realty or not, for the law is plain that chattels annexed shall go to one or the other, as, in law, they are realty or personalty. Substantially the same rules of law apply to parties in this relation as between grantor and grantee, and as between mortgagor and mortgagee.² This general rule has been modified in some of the states by statutory legislation providing what property shall go to the administrator or executor. Thus, in New York there is a statute providing that articles annexed to the freehold for the purpose of trade or manufacture go to the executor or administrator.³

§ 72. Relation of the parties.

The same rule of law applies, whether the heir is one who claims by operation of law, or by devise as against an administrator or executor, whether the heir claims through a tenancy by curtesy, an estate of dower, or *pur autre vie*.⁴

² See ante, note 1.

³ 2 Rev. St. p. 82, § 6, subd. 4 (1 Bird's Rev. St. [2d Ed.] p. 1200, par. 4); 2 Rev. St. p. 83, § 7 (1 Bird's Rev. St. [2d Ed.] p. 1200, par. 9). By these statutes the legislature evidently intended to put an executor or administrator upon the same footing as with a tenant as to the right to fixtures. *House v. House*, 10 Paige (N. Y.) 158. Under this statute, water wheels, mill stones, bolting apparatus, and the running gear of a grist and flouring mill were held to pass to the heir. *House v. House*, 10 Paige (N. Y.) 158. So, in *Buckley v. Buckley*, 11 Barb. (N. Y.) 63, Justice Hand, in a learned opinion in reference to this statute, said: "It seems to me that the rule in this state, as between vendor and vendee, mortgagor and mortgagee, and heir and personal representative of the deceased, still is, that whatever is annexed or affixed to the freehold by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there, particularly if for the purpose of enjoying the realty, or some profit therefrom, is a part of the freehold." See *Murdock v. Gifford*, 18 N. Y. 28; *Ford v. Cobb*, 20 N. Y. 344.

⁴ In *Norton v. Dashwood*, [1896] 2 Ch. 497, it was stated by Justice

§ 73. Trade fixtures.

As between executor and heir, there exists no exception in favor of chattels annexed for purposes of trade;⁵ for the principle of law invoked as to trade fixtures, as between landlord and tenant, has no application where the party who erects the fixtures owns both the realty and the property attached.⁶

Chitty that no distinction can be drawn between a claim by an executor against an heir and a claim by an executor against a devisee. But it seems that the rule is different, as between executor and devisee, when the testator bequeaths his residuary personal estate to his executor, for here the devisee of the land takes the emblements as against the executor, contrary to the general rule as between executor and heir. *Cooper v. Woolfit*, 5 Wkly. Rep. 790; *Tyler*, Fixtures, p. 702.

⁵ The English case of *Fisher v. Dixon*, 12 Clark & F. 312, has considered this point extensively, and the rule seems well settled in England. See *Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, 1 Amb. 113; *Elwes v. Maw*, 3 East, 38.

The running gear of a cotton gin is a fixture, and the administrator has no right to sell it. *McKenna v. Hammond*, 3 Hill (S. C.) 331, 30 Am. Dec. 366.

But in Tennessee, in the case of *McDavid v. Wood*, 5 Heisk. (52 Tenn.) 95, the interest of a decedent in a saw mill erected for manufacturing purposes was held to pass to the personal representative as personalty. So, in *Pillow v. Love*, 5 Hayw. (Tenn.) 109, the court stated: "As between heir and executor, modern notions are far more liberalized and accommodated to the ordinary purposes of those who carry on business than formerly."

Where a husband, during coverture, put up a steam engine on his wife's real estate for the purpose of carrying on his trade, his representatives could remove the same after his death. *In re Hinds' Estate*, 5 Whart. (Pa.) 138, 34 Am. Dec. 542.

Improvements made by a son of the devisor who had willed to him on trust a certain factory, with its implements and tools, are trade fixtures removable by the son. *Wiley v. Morris*, 39 N. J. Eq. 97.

⁶ In *Fisher v. Dixon*, 12 Clark & F. 312, in the house of lords, Lord (320)

§ 74. Domestic and ornamental fixtures.

Likewise, the general rule is that there is no exception in favor of the executor as to fixtures erected by the decedent for purposes of domestic convenience or ornament;⁷ although this rule does not extend to articles of mere furniture mov-

Cottenham there said: "The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property, which he erected and employed in carrying on the works. He might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the control of the person who erected this machinery."

⁷ Pictures and glasses put up instead of wainscot go to the heir. *Cave v. Cave*, 2 Vern. 508.

Stoves and grates fixed to the realty pass to the heir. *Colegrave v. Dias Santos*, 2 Barn. & C. 76; *Rex v. Inhabitants of St. Dunstan*, 4 Barn. & C. 686.

Tapestry cut and pieced so as to cover the walls of the room, and hung by being nailed to wooden battens let into the plaster, and nailed to the brickwork, are a part of the freehold. *Norton v. Dashwood*, [1896] 2 Ch. 497.

In *Tuttle v. Robinson*, 33 N. H. 104, a Franklin stove, weighing about three hundred pounds, set in a barroom of the decedent's house, on brickwork, without legs, and with a very short funnel, bricked around, was held to pass to the heir.

So, a stone sink weighing about two hundred and fifty pounds, set in the corner of a room in a dwelling house, not nailed or fastened to the house, was held a part of the realty. *Bainway v. Cobb*, 99 Mass. 457. Contra, a furnace affixed to the freehold, and hangings

able in their nature, and in no way permanently attached to the freehold.⁸

§ 75. Fixtures by devise.

As between the devisee and the personal representative, the same principles apply as between heir and personal representative, in the absence of any contrary intentions expressed in the will, the general rule being that the devisee takes the land in the same condition in which it would have descended to the heir;⁹ hence, fixtures that are a part of the realty pass with the land by devise, whether they were annexed prior or subsequently to the date of the devise.¹⁰ So, all chattels, whether actually or constructively annexed to the realty, pass to the devisee, so long as they would be determined a part of the realty in accordance with the general rules applicable as between heir and personal representative.¹¹ Likewise, articles that are a part of the realty may

nailed to the walls, go to the executor. *Squier v. Mayer*, Freem. Ch. 249, 2 Eq. Cas. Abr. 430.

Hanging tapestry and iron backs to chimneys belong to the executor. *Harvey v. Harvey*, 2 Strange, 1141.

⁸ *Squier v. Mayer*, 2 Freem. Ch. 249; *Harvey v. Harvey*, 2 Strange, 1141; *Lockwood v. Lockwood*, 3 Redf. Sur. (N. Y.) 330.

⁹ *Norton v. Dashwood*, [1896] 2 Ch. 497.

¹⁰ *Amos & Ferard*, Fixtures, p. 246.

¹¹ In *Dana v. Burke*, 62 N. H. 627, where a cottage and the land on which it stood was devised, it was held that a boat used in connection with the cottage did not pass with the devise, for the reason that there was no actual or constructive annexation of the same to the realty. But in *Lockwood v. Lockwood*, 3 Redf. Sur. (N. Y.) 330, it was held that mirrors fastened by clamps to the wall, and corresponding with the mantel on which they rested, passed by the devise. So, tapestry, in a manor house, nailed to wooden battens let into the plaster, and nailed to the brickwork, the removal of which would

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be devised with the land, or separately, if the testator has a devisable interest in the land.¹² As to fixtures that are removable and are considered personalty, the devisor, of course, can bequeath the same as personal property. As to trade, domestic, or ornamental fixtures which are removable, but, according to some cases, are considered a part of the realty until removed, it appears that the tenant may bequeath the same by his will.¹³ There appears to be one point of distinction in the general rules applicable as between heir and personal representative, and as between devisee and personal representative. As to emblements, the general rule is, as between heir and personal representative, that they go to the personal representative as personalty,¹⁴ but, as between devisee and personal representative, they go to the devisee.¹⁵

disfigure the room, pass under a devise of the house. *Norton v. Dashwood*, [1896] 2 Ch. 497.

¹² *Liford's Case*, 11 Coke, 48a.

¹³ *Johnston v. Swann*, 3 Madd. 457; *Paton v. Sheppard*, 10 Sim. 186.

¹⁴ The court, in *Sparrow v. Pond*, 49 Minn. 417, said: "At common law, those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man, termed 'emblements,' and sometimes 'fructus industriales,' were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes, and grasses growing from perennial roots, and called, by way of contradistinction, 'fructus naturales,' were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life."

See *Thornton v. Burch*, 20 Ga. 791; *Singleton's Heirs v. Singleton's Ex'rs*, 5 Dana (Ky.) 87; *Parham v. Thompson*, 2 J. J. Marsh. (Ky.)

§ 76. Machinery.

Articles of machinery annexed to the realty for the better enjoyment of the land, or even for manufacturing purposes, are generally held to pass to the heir.¹⁵

159; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Pattison's Appeal*, 61 Pa. 294, 100 Am. Dec. 637; *McGee v. Walker*, 106 Mich. 521; *Farley v. Hord*, 45 Miss. 96; *Wadsworth v. Allcott*, 6 N. Y. 64.

¹⁵ *West v. Moore*, 8 East, 339; *Kinsman v. Kinsman*, 1 Root (Conn.) 180, 1 Am. Dec. 37; *McCormick v. McCormick*, 40 Miss. 761; *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 N. Y. 158; *Smith v. Barham*, 2 Dev. Eq. (17 N. C.) 420, 25 Am. Dec. 721. In the case last cited the court said: "The crops growing on the land at the time of the testator's death go to the executor as against the heir, but, as between the executor and the devisee, the latter is entitled to them. The devisee takes the land by the intention of the testator, with everything on it; for, as the devisee carries the land against the heir, so it does the crop against the executor."

¹⁶ Machinery in a mining plant passes to the heir. *Fisher v. Dixon*, 12 Clark & F. 312. So, machinery in a cotton factory, consisting of dams, water wheels, gearing, etc. *Buckley v. Buckley*, 11 Barb. (N. Y.) 43. So, the running gear of a cotton gin. *McKenna v. Hammond*, 3 Hill (S. C.) 331, 30 Am. Dec. 366. So, the water wheels, mill stones, bolting apparatus, and running gear in a grist mill. *House v. House*, 10 Paige (N. Y.) 158. So, the main mill wheel and gearing of a factory attached to the factory. *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 459, Fed. Cas. No. 11,357.

The fact that machinery affixed to the land is used for purposes of trade and manufacture does not prevent it from passing to the heir. *Mather v. Fraser*, 2 Kay & J. 536.

Miscellaneous articles held to pass to the heir: Rails in a fence, but not those taken from a fence and placed in piles upon the land. *Clark v. Burnside*, 15 Ill. 62. A saw mill built in a permanent manner, and attached to the soil. *Kinsell v. Billings*, 35 Iowa, 154. Hay scales set on land in an excavation made in stone for the purpose. *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489. Gravestones. *Sabin v. Harkness*, 4 N. H. 415, 17 Am. Dec. 437. Manure taken from the barnyard and piled upon land in heaps. *Fay v. Muzzey*, 13 Gray (324)

§ 77. Charters.

Formerly, when charters or deeds relating to the inheritance were the evidential muniments of an estate, the question frequently arose between heir and personal representative as to whom the charter belonged; but in the United States, a registration in public offices of deeds of conveyance is universally provided for by statute, so that the grantor generally keeps his own conveyances of title, and the grantee, from the records, ordinarily can ascertain and establish his title. In consequence, this subject is not of very much practical importance. However, the general rule is that charters shall always follow the land to which they relate, and shall vest in the heir as incident to the estate, *et ratione terrae*.¹⁷ So, land warrants which authorized the selection and location of certain land out of the unimproved lands of the United States have been held to pass to the heir.¹⁸ But charters or deeds relating to estates, less than estate of freehold, are personalty.¹⁹ So, it has been held that the box or chest in which the charter or deeds are preserved passes to the heir.²⁰

§ 78. Heirlooms.

In the United States, no decisions have been found recognized. (Mass.) 53, 74 Am. Dec. 619. Hop poles on a farm, taken up and laid away in a yard until the next hop season. *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68. But a still not fixed to the freehold goes to the personal representative. *Crenshaw v. Crenshaw's Ex'r*, 2 Hen. & M. (Va.) 22. Nursery trees planted by the owner of land. *Osborn v. Rabe*, 67 Ill. 108; *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Meyers v. Schemp*, 67 Ill. 469.

¹⁷ *Wilson v. Rybolt*, 17 Ind. 391; *Lord v. Wardle*, 3 Bing. N. C. 680.

¹⁸ *Atwood's Heirs v. Beck*, 21 Ala. 590.

¹⁹ *Ewell, Fixtures*, p. 231.

²⁰ *Ewell, Fixtures*, p. 230; *Comyn, Dig. Biens B in Charter A*.

nizing the law of heirlooms. An "heirloom," in its strict and proper sense, is always some loose personal chattel, such as would ordinarily pass to the personal representative, except for the particular custom.²¹ In accordance with the primary meaning of the term "heirlooms," they are chattels which, on the death of the ancestor, pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed, and the like. The second is where the chattels, to use the old phrase, "savor of inheritance,"—that is, are directly connected with it. This class includes title deeds, and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn, where the tenure is by cornage, as in the case of the Pusey horn, and the ancient jewels of the crown. But there is a secondary sense in which the term "heirlooms" is used; that is, where chattels are settled by deed or will or otherwise, vesting them in trustees upon trusts declared, whereby they are limited to go along with corporeal or incorporeal hereditaments, so far as the

²¹ Legal authorities vary as to the etymology of the word "heirloom." Some separate it into the words "heir" and "loom;" the latter word designating a loom to weave in, the composite word representing that which descended to the heir, which, by use, came to include many things other than looms. Others consider the word "loom" to be of Saxon origin, meaning a limb or member. Still others assert that the word "loom" is derived from the Saxon "loma" or "geloma," denoting household stuff, which, together with the word "heir," means such utensils and other things as go to the heir. Smith, *Personal Property*, p. 18; Bouvier, *Law Dict.* "Heirloom;" Anderson, *Law Dict.* "Heirloom;" Webster, *Dict.* "Heirloom;" 1 Schouler, *Personal Property*, p. 117; 2 Blackstone, *Commentaries*, p. 428.

rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term "heirlooms" is employed popularly, and also by lawyers as a brief description.²² So, in the strict sense, heirlooms pass to the heir by reason of special custom. Thus, ancient portraits and family pictures, though not affixed to the wall in the house, accompany the inheritance.²³ So, an ancient horn where the tenure of the land is by cornage, shall always descend to the heir.²⁴ So, also, the ancient jewels of the crown are accounted heirlooms.²⁵ But there are heirlooms, so called, which pass to the heir without reference to any local custom. Thus, a monument or tombstone has been held to be an heirloom.²⁶

It appears that a person may by will constitute what has been called a *quasi* heirloom,—that is, he may devise or limit in strict settlement an estate, together with personal property, such as the plate, pictures, library, and furniture therein, to be enjoyed along with the estate, inalienable by the devisees in succession so far as the law will allow. In respect to heirlooms depending upon custom, it appears that they cannot be willed away from the heir; that is to say, when the inheritance to which they belong descends to him. The

²² *Hill v. Hill*, [1897] 1 Q. B. 494.

²³ *Amos & Ferard, Fixtures*, p. 195.

²⁴ *Pusey v. Pusey*, 1 Vern. 273.

²⁵ 2 Blackstone, Commentaries, 428. So, also, the collar of S. S. and garter of gold descend as ensigns of honor and state, in the way of heirlooms. So, the ornaments of a bishop's chapel are treated as heirlooms. Likewise, chattels in ecclesiastical houses. *Ewell, Fixtures*, p. 235.

²⁶ *Spooner v. Brewster*, 3 Bing. 136.

owner of the inheritance, however, may, during his life, sell or dispose of these customary heirlooms just as he may the timber of his estate.²⁷

§ 79. *Animals ferae naturae.*

As between heir and personal representative, deer, fish, and other animals *ferae naturae* have been held to pass to the heir. This rule exists *ratione soli* or *ratione privilegii*; that is, by reason of the ownership of the soil, or of a privilege or franchise. The right to animals *ratione soli* is the common-law right which every owner of the realty has to kill and capture all such animals *ferae naturae* as may happen upon his land from time to time, and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. The right *ratione privilegii* is that which anciently existed by a peculiar franchise granted by the crown, in view of its prerogative, whereby one man was permitted to kill and capture animals *ferae naturae* on the land of another, and to become the absolute owner of the animals so killed or captured.²⁸ Lord Coke states the rule thus: "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, etc., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore, in an action *quare parcum warrennum, etc., fregit et intravit*, 3. *damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say 'suos,' for he hath no property in them, but they do belong to him *ratione privilegii*, for his game and pleasure, so long as they

²⁷ Ewell, Fixtures, p. 237.

²⁸ 4 Blackstone, Commentaries, 591.

remain in the privileged place; for if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete."²⁹ It is also said by Lord Coke³⁰ that "if a man buy divers fishes, as carps, breames, trenches, etc., and put them in his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall go with the inheritance, because they were at libertie, and could not be gotten without industrie, or by nets and other engines. Otherwise it is if they were in trunks or the like. Likewise, deere in a parke, conies in a warren, and doves in a dovehouse, young and old, shall goe to the heire." So it is held that the owner of the land upon which the tree stands has a qualified property *ratione soli* in wild and unreclaimed bees in a bee tree thereon.³¹ So it is seen that animals *ferae naturae* pass to the heir, instead of to the personal representative, not by reason of the right of property which the ancestor possesses in them, but by reason of the right to take them *ratione soli* or *ratione privilegii*.

The rule above mentioned applies to the cases where the ancestor had an estate of inheritance. Where the interest of the ancestor in the land is only a chattel interest, the heir of course has no interest in either the land or its appurtenances.³²

²⁹ See the Case of the Swans (1592) 7 Coke, 17b.

³⁰ See *supra*, note 29; also Co. Litt. 8a.

³¹ Wild bees found in a tree belong to the owner of the realty. *Merrills v. Goodwin*, 1 Root (Conn.) 209; *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; *Gillett v. Mason*, 7 Johns. (N. Y.) 16; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

³² See Ewell, *Fixtures*, p. 241 et seq.

It is only by reason of the fact that animals *ferae naturae* are, in some instances, regarded as appurtenances of land, and hence, in a measure, subject to the rules applicable thereto, that they have been considered in connection with fixtures. Properly speaking, animals *ferae naturae* are not included within the term "fixtures."

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CHAPTER X.

FIXTURES AS BETWEEN TENANTS IN COMMON.

- § 80. General rule.
- 80a. Unity of title.
- 81. Erections by one cotenant.
- 82. Effect of agreement.
- 83. Machinery.
- 84. Buildings.

§ 80. General rule.

Generally, contests as to the right to fixtures arise between parties, one of whom has no existing interest in the real estate to which the fixtures are annexed, but where they are tenants in common, they each own an undivided share in the freehold. The question as to fixtures arises between these parties most frequently where one of the tenants has annexed chattels to lands owned by him and another in common, and then claims the annexed articles as his personal property. The general rule of law in regard to fixtures applicable between these parties is the same as that announced as between grantor and grantee.¹ In fact, it is stated that the general maxim of law, that what is annexed to the land becomes a part thereof, receives its most stringent interpretation when applied to tenants in common.²

¹ *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43.

² *Parsons v. Copeland*, 38 Me. 537; *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

§ 80a. Unity of title.

But it may be observed that there is a line of cases which hold that unity of title must exist in the chattel annexed to the realty, as well as in the realty.³ Thus, where a cotenant of the realty, having an undivided interest therein, annexes to the realty chattels which are his exclusive property, it has been held that they do not become a part of the freehold so long as they are capable of severance without injury to the realty.⁴ This holding is upon a theory that a chattel cannot be real estate as to one undivided interest, and be personalty as to another undivided interest.⁵

§ 81. Erection by one cotenant.

Where one annexes chattels upon land owned by him and another in common, so as to ordinarily become a part of the realty in accordance with the general rules and tests of fixtures, such chattels are a part of the real estate, and cannot be removed by him as his personal property without the consent of his cotenant.⁶ If he desires to annex chattels to the realty held in common, and to retain the right to remove the same, his course is to proceed by partition.⁷

³ See ante, c. 7, § 62, note 38.

⁴ *Robertson v. Corsett*, 39 Mich. 777; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Lansing Iron & Engine Works v. Wilbur*, 111 Mich. 413, 69 N. W. 667.

⁵ *Adams v. Lee*, 31 Mich. 440.

⁶ One tenant in common cannot erect buildings or make improvements on the common property without the consent of the rest, and then claim to hold, until reimbursed, a proportion of the money expended; nor can he authorize this to be done by a third person. *Crest v. Jock*, 3 Watts (Pa.) 236, 27 Am. Dec. 353.

⁷ *Dech's Appeal*, 57 Pa. 472.

§ 82. Effect of agreement.

Where one cotenant erects a fixture upon land held in common, with the agreement or permission, either express or implied, of the other cotenants, that the same shall remain the property of the cotenant annexing, it appears that the same remains personalty.⁸ However, the mere fact that a cotenant, before erecting a building, obtained the consent of his cotenants, does not authorize him to regard it as his own, in the absence of a specific agreement to that effect.⁹ So, the mere failure of a cotenant to object to the annexation by his cotenant does not grant to the tenant annexing the right of removal.¹⁰

§ 83. Machinery.

Machinery erected upon land owned by tenants in common, and annexed thereto, is a part of the real estate.¹¹

§ 84. Buildings.

So, buildings erected by one cotenant upon real estate owned in common become a part of the freehold.¹²

⁸ *Parsons v. Copeland*, 38 Me. 537; *Howard v. Fessenden*, 14 Allen (Mass.) 124; *Fair v. Fair*, 121 Mass. 559; *Aldrich v. Husband*, 131 Mass. 480.

⁹ *Baldwin v. Breed*, 16 Conn. 60.

¹⁰ *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353.

¹¹ Carding machines, looms, etc., in a woolen factory, are a part of the realty. *Parsons v. Copeland*, 38 Me. 537. So, a boiler, engine, and stock erected upon land. *Hill v. Hill*, 43 Pa. 521. So, a marine railway. *Strickland v. Parker*, 54 Me. 263. But mere loose machinery in a woolen factory is personalty. *Walker v. Sherman*, 20 Wend. (N. Y.) 636. So, a portable engine placed by one cotenant upon land held in common does not become a part of the realty. *Greenwood v. Maddox*, 27 Ark. 661.

¹² *Aldrich v. Husband*, 131 Mass. 480; *Baldwin v. Breed*, 16 Conn. 60.

CHAPTER XI.

FIXTURES AS BETWEEN LIFE TENANT AND REMAINDERMAN.

- § 85. General rule.
- 86. Relation of the parties.
- 87. Trade fixtures.
- 88. Domestic and ornamental fixtures.
- 89. Agricultural fixtures.
- 90. Effect of agreement.
- 91. Annexation by the husband to the land of his wife.

§ 85. General rule.

As between the personal representative of the life tenant and the remainderman or reversioner, the same general rules and principles of fixtures announced as between landlord and tenant are applicable, but perhaps not with the same degree of indulgence as has been shown to the tenant for years.¹ However, the same reason for the rule permitting the tenant for years to remove chattels temporarily annexed by him, as against his landlord, exists in favor of the tenant for life. In fact, the relations sustained by a tenant to his landlord, and by a tenant for life to his remainderman or reversioner, are strongly analogous; but cases between the former parties are not of frequent occurrence, and, in conse-

¹ Cannon v. Hare, 1 Tenn. Ch. 22; Elwes v. Maw, 3 East, 38; White v. Arndt, 1 Whart. (Pa.) 91; Buckley v. Buckley, 11 Barb. (N. Y.) 61; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Stewart v. Matheny, 66 Miss. 21, 14 Am. St. Rep. 538; Clemence v. Steere, 1 R. I. 272.

quence, the rights of a tenant for life have not been so liberally construed and extended as those of an ordinary tenant.²

§ 86. Relation of the parties.

The general rule applies equally well whether the life tenancy arises through grant, dower, or curtesy. Tenants for life are usually widows as dowresses or husbands as tenants by curtesy, or devisees under wills, with remainder to children or other blood relations. In such cases, the persons entitled to the reversion or the remainder are ordinarily those nearest related to the tenants of the life estate, and hence it may readily be seen why the cases, as between these parties, are not as indulgent to the tenant as in the relation of landlord and tenant.³

§ 87. Trade fixtures.

In accordance with the rule as to trade fixtures existing between landlord and tenant, it is generally agreed that a tenant for life, or his personal representative, may remove chattels annexed by him to the realty for purposes of trade.⁴ It

² *Buckley v. Buckley*, 11 Barb. (N. Y.) 43; *Ewell*, Fixtures, p. 190.

³ *Cannon v. Hare*, 1 Tenn. Ch. 22.

⁴ "As between tenant for life or years and reversioner or remainderman, all erections by the former for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and, as such, may be removed by him during his term, or be made available to his creditors on a *fieri facias*." *Walker v. Sherman*, 20 Wend. (N. Y.) 636, 638.

A fire engine set up by a tenant for life in a colliery, and used for carrying on a species of trade, does not pass to the remainderman. *Lawton v. Lawton*, 3 Atk. 13.

Machinery annexed to the realty by a tenant by the curtesy for

may be noted that an ordinary tenant must remove his trade fixtures before his tenancy expires; but the personal representative of a tenant for life has the privilege of removal after the tenancy expires, and after the estate has vested in the remainderman. If this were not so, the very purpose of the rule would be obviated; for a tenant for life may die at any moment, and, *eo instanti*, his tenancy lapses. In this respect he is placed in a worse position than the tenant at will, or a tenant holding for an uncertain period, since the latter may exercise his right after the termination of the tenancy and before surrendering possession of the realty.⁵

§ 88. Domestic and ornamental fixtures.

As to trade fixtures, there is little doubt but that the life tenant has the right to remove the same; but as to domestic and ornamental fixtures it appears that there is no authority which definitely extends the exception to the general rule as to these fixtures in favor of the life tenant.⁶ In D'Eyn-

the purpose of milling corn and ginning cotton for himself and for the neighborhood passes, on his death, to his personal representative, as against the remainderman. *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722.

In *Re Hind's Estate*, 5 Whart. (Pa.) 138, 34 Am. Dec. 542, where a woman owning real estate married, and her husband, during the coverture, put up a steam engine on a stone and brick foundation, for the purpose of carrying on the carding and spinning business, it was held that the wife was not entitled to the same as against the personal representative of the husband. But see the case of *Albert v. Uhrich*, 180 Pa. 283.

⁵ *Martin v. Roe*, 7 El. & Bl. 237; *Ewell, Fixtures*, p. 208. But if the life tenant voluntarily surrenders his interest to certain property, the rule is otherwise.

⁶ *D'Eyncourt v. Gregory*, 15 Wkly. Rep. 186, L. R. 3 Eq. 382, 387-391, 394-397, 36 Law J. Ch. 107.

court v. Gregory where the question arose as to the right of a life tenant to certain articles of an ornamental character attached to a manor house erected by him, it was held that the tapestry on wooden stretchers attached to the walls, and carved and gilt frames but slightly attached with nails and screws, and carved, kneeling figures and stone garden seats attached to the realty simply by the force of gravity, were a part of the realty, but that the chimney glass, the ornamental frame, and the oil painting, which appeared to be no part of the house, only a simple ornamental piece of furniture which the testator himself might have removed, were removable by the life tenant. But, in a late English case upon the subject, the exception in favor of ornamental fixtures, as between landlord and tenant, to the rule "*Quicquid plantatur solo, solo cedit*," has been expressly recognized to obtain equally as well between life tenant and remainderman.⁷

§ 89. Agricultural fixtures.

In accordance with the general law of fixtures, articles attached to the realty by the life tenant for agricultural purposes pass to the reversioner;⁸ but in mixed cases, where the

⁷ Where tapestries were attached by means of nails and molding to the walls of a drawing room by a tenant for life, for ornamental purposes, it was held, as between life tenant and remainderman, that the exception in favor of ornamental fixtures to the rule, "*Quicquid plantatur solo, solo cedit*," obtained as well as between landlord and tenant, and that the tenant could remove them, or his executors, after his death. *In re De Falbe*, 70 Law J. Ch. 286, 1 Ch. 523, 84 Law Times, 273, 49 Wkly. Rep. 455.

⁸ In *McCullough v. Irvine's Ex'rs*, 13 Pa. 438, the court said: "If the tenant, after having enjoyed the fruits of the land during perhaps a long life, may, just before his death, strip it of the fences

chattel annexed is used for a combined trade and agricultural purpose, the rule is otherwise.⁹

§ 90. Effect of agreement.

Ordinarily, as between the parties themselves, there is apparently no reason why the parties may not contract as to the character of fixtures erected by the life tenant upon the realty in accordance with the general rules previously announced;¹⁰ but a husband and wife cannot contract as to the nature of fixtures erected by the husband upon the realty of the wife except in those states where statutory legisla-

he has built, and the house and barn he has erected, because the advance in the improvement and commerce of the country would leave the land of as much intrinsic value as when he took possession, and convert it into a solitary waste for the winds to moan over, the tenant of a new generation will have to take the land as it was a generation before, and commence improvements de novo. This, I apprehend, would be a slovenly mode of promoting the interests of agriculture. There is a debt due to the land in return for its fruits and products, and a good tenant for life always pays it. He manures it, fences it, and builds a habitation on it, and they become part of the freehold, and thus the interest of agriculture is promoted. These exertions are the voluntary gift of the life tenant to the inheritance. He dedicates them to the inheritance when he has enjoyed the fruits of his labor. A good farmer creates, but does not destroy; and I may add that this rule, just in itself, has a tendency to liberalize the social affections, as well as to promote agriculture. It banishes that sordid and selfish spirit which would destroy what the individual can no longer enjoy."

A barn upon the estate passes to the reversioner. *Haflick v. Stober*, 11 Ohio St. 482. So, a row of buildings erected upon a certain lot for rental purposes. *Cannon v. Hare*, 1 Tenn. Ch. 22; *Demby v. Parse*, 53 Ark. 526.

⁹ *Lawton v. Lawton*, 3 Atk. 13; *Overman v. Sasser*, 107 N. C. 432.

¹⁰ See ante, c. 5, "Agreements as to the Character of Fixtures."

tion has given the wife contractual powers.¹¹ So, a third party holding under a life tenant cannot acquire greater rights against the reversioner than the tenant himself possessed, by an agreement with the life tenant giving him the right of removal.¹²

§ 91. Annexation by the husband to the land of his wife.

In many of the states the old common-law estates by the curtesy have been either abolished by statute¹³ or greatly modified by the married women's acts, giving to women greater property rights;¹⁴ so that the ordinary rules pertaining to

¹¹ *Doak v. Wiswell*, 38 Me. 569.

¹² Where a tenant for years, holding under a tenant for life, builds a barn and other structures thereon for farming purposes, under an agreement between them that he shall have the privilege of removing them, such agreement is invalid as against an infant remainderman after the termination of the life estate. *Haflick v. Stober*, 11 Ohio St. 482.

One who has erected buildings on the land of life tenant has no right to remove them under an agreement, made with him by the life tenant, that he might erect and remove them. *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87.

¹³ *Starr & C. Ann. St. Ill.* (1896) c. 41, § 1; *Monroe v. Van Meter*, 100 Ill. 347; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427; *McNeer v. McNeer*, 142 Ill. 388; *Gray v. Givens*, 2 Hill Eq. (S. C.) 511; *Withers v. Jenkins*, 14 S. C. 597; *Gaffney v. Peeler*, 21 S. C. 55; *Frost v. Frost*, 21 S. C. 501; *Todd v. Oviatt*, 58 Conn. 184; *Hill v. Nash*, 73 Miss. 849; *Winkler v. Winkler's Ex'r*, 18 W. Va. 455.

¹⁴ Alabama: *Brevard's Ex'rs v. Jones*, 50 Ala. 221.

Arkansas: *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Hampton v. Cook*, 64 Ark. 353, 42 S. W. 535.

Michigan: *White v. Zane*, 10 Mich. 333.

New Jersey: *Johnson v. Cummins*, 16 N. J. Eq. 97; *Porch v. Fries*, 18 N. J. Eq. 204; *Cushing v. Blake*, 30 N. J. Eq. 689. See, also, *Ross v. Adams*, 28 N. J. Law, 160; *Naylor v. Field*, 29 N. J. Law, 292.

New York: *Matter of Winne*, 2 Lans. 21, reversing 1 Lans. 508,

the relationship of life tenant and reversioner are subject to modification as between husband and wife. It has been held that the husband, where he annexed chattels of a permanent nature to the freehold, is within the general rule that gives to the owner of the land fixtures erected by a stranger.¹⁵ So, the fact that the husband has erected a trade fixture upon his wife's land does not give him the right of removal.¹⁶ The fact that the wife may consent to the removal of fixtures erected by the husband upon her land is immaterial, inasmuch as she has no power to contract with her husband.¹⁷

disapproving *Billings v. Baker*, 15 How. Pr. 525, 28 Barb. 343; *Beamish v. Hoyt*, 2 Rob. 307; *Young v. Langbein*, 7 Hun, 151; *Arrow-smith v. Arrowsmith*, 8 Hun, 606; *Leach v. Leach*, 21 Hun, 381; *In re Mitchell*, 61 Hun, 372; *Mack v. Roch*, 13 Daly, 103; *Clark v. Clark*, 24 Barb. 581; *Hurd v. Cass*, 9 Barb. 366; *Lansing v. Gulick*, 26 How. Pr. 250; *Jaycox v. Collins*, 26 How. Pr. 496; *Hatfield v. Sneden*, 54 N. Y. 280; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361.

North Carolina: *Long v. Graeber*, 64 N. C. 431; *McCaskill v. McCormac*, 99 N. C. 548. See, also, *Doe d Houston v. Brown*, 7 Jones (52 N. C.) 162.

Pennsylvania: *Thornton's Ex'rs v. Krepps*, 37 Pa. 391.

Virginia: *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

Wisconsin: *Kingsley v. Smith*, 14 Wis. 360; *Oatman v. Goodrich*, 15 Wis. 589.

¹⁵ *Albert v. Uhrich*, 180 Pa. 283. So, in *Glidden v. Bennett*, 43 N. H. 306, it was held that a husband who erected fences upon the dower land of his wife was subject to the rule existing between vendor and executor.

¹⁶ *Albert v. Uhrich*, 180 Pa. 285. But see *In re Hinds' Estate*, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; *Overman v. Sasser*, 107 N. C. 432.

¹⁷ *Doak v. Wiswell*, 38 Me. 569; *Marable v. Jordan*, 5 Humph. (24 Tenn.) 417; *Demby v. Parse*, 53 Ark. 526.

CHAPTER XII.

LEVY AND SALE OF FIXTURES ON EXECUTION.

- § 92. General rule.
- 93. Levy on land.
- 94. Levy on chattels annexed to the land.
- 95. Tenant's fixtures.
- 96. The effect of agreement.
- 97. Severance.
- 98. Time of annexation.

§ 92. General rule.

In determining what fixtures pass by a levy or sale on execution, the general rules and principles invoked as between grantor and grantee, and as between mortgagor and mortgagee, are applicable.¹ Thus, as against an owner of the land, chattels so annexed as to ordinarily become a part thereof cannot be levied upon as goods and chattels;² but

¹ *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 459, Fed. Cas. No. 11,357; *Price v. Brayton*, 19 Iowa, 309; *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120; *Parsons v. Copeland*, 38 Me. 537; *Strickland v. Parker*, 54 Me. 263; *Kirwan v. Latour*, 1 Har. & J. (Md.) 289, 2 Am. Dec. 519; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527; *Weaver v. Morris*, 1 Del. Co. R. (Pa.) 230. The rule is the same, whether the sale is by the owner, or by a public officer under the law. *Price v. Brayton*, 19 Iowa, 309; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527; *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120.

² *Machinery in a sash, door, and blind factory*. *Green v. Phillips*, 26 Grat. (Va.) 752. Lath, shingles, and lumber deposited upon the lot by the owner thereof to repair his house. *Krueger v. Pierce*, 37 Wis. 269. So, as between a mortgagee of the realty and a levying

in an execution as against a tenant, all those tenant's fixtures which are removable as against his landlord, whether erected for the purpose of trade or otherwise, can be levied upon as goods and chattels.³

§ 93. Levy on land.

In a levy on the realty, or by a sale under the levy, all those chattels which are so annexed to the freehold as to be a part thereof under the general rules applicable pass with the levy.⁴ Thus, machinery in factories and other manu-

judgment creditor, a boiler, engine, and shafting in a nail and tack factory are a part of the realty, and not subject to the levy. *Homestead Land Co. v. Becker*, 96 Wis. 210, 71 N. W. 117. See, also, *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426.

³ Although the very early English authorities did not permit chattels annexed by a tenant to be levied upon as chattels, yet, since the decision in *Poole's Case*, 1 Salk. 368, the rule has been well settled that a tenant's fixtures are subject to be levied upon during the continuance of his term.

A still attached by a lessee upon lands of the lessor can be seized by the sheriff as between the creditors and the lessee. *Pillow v. Love*, 5 Hayw. (Tenn.) 109.

In *Pemberton v. King*, 2 Dev. (13 N. C.) 376, it was held that, as between a tenant and his creditors, an engine actually affixed to the freehold, and not removable without tearing down the masonry and house which surrounded it, was a part of the realty while so annexed, and that a severance of the engine was necessary by the officer before the levy and sale could be valid.

So, a steam engine erected by the lessee is subject to levy as personalty. *Lemar v. Miles*, 4 Watts (Pa.) 330. So, a steam engine and boiler. *Hey v. Bruner*, 61 Pa. 87. So, iron rails laid on a track in a tunnel by the lessee of coal lands. *Heffner v. Lewis*, 73 Pa. 302.

⁴ A smutter lent to the owner of a grist mill, and fastened therein in the usual manner, passes to a purchaser of the premises at a judicial sale, who has no knowledge of the facts. *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120.

A clapboard machine and a shingle machine, fastened into a saw
(342)

facturing plants has been held to pass by a levy of the land upon which it was situated.⁵

mill, to be there used, are a part of the realty, and pass by a levy upon the same. *Trull v. Fuller*, 28 Me. 545.

Where a lot and still house thereon were sold by the sheriff on execution, it was held that the pumps, cisterns, iron grating and doors, distillery, and house mills passed to the purchaser, but not the joists, vats, buckets, etc., which were not fixed to the freehold. *Kirwan v. Latour*, 1 Har. & J. (Md.) 289, 2 Am. Dec. 519.

A marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels, and ship cradle, passes by a levy upon the realty. *Strickland v. Parker*, 54 Me. 263.

As against a purchaser of the realty at an execution, a portable grist mill, situated thereon, connected with other machinery in the building by a belt fastened to the floor by iron rods and bolts, and designed as a permanent structure for use as a custom grist mill, is a part of the realty. *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485.

Machinery placed upon a lot in a factory, with a view to carrying on a permanent business, passes by levy of the realty. *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 634.

A levy on a saw mill includes a circular saw which was in and constituted a part of the saw mill. *Newhall v. Kinney*, 56 Vt. 591.

Growing crops, being a part of the realty, are subject to levy and execution. *Porche v. Bodin*, 28 La. Ann. 761.

An execution sale of the land upon which crops are growing passes title to the crops to the purchaser. *Bear v. Bitzer*, 16 Pa. 175, 55 Am. Dec. 490.

Articles held not to pass by a levy upon the realty: Gas fixtures attached to gas pipes do not pass by an execution sale of the realty. *Vaughen v. Haldeman*, 33 Pa. 522, 75 Am. Dec. 622. Rolls cast for a rolling mill, not actually attached, but delivered at the mill, and ready for use, do not pass by a levy upon the realty. *Johnson v. Mehaffey*, 43 Pa. 308, 82 Am. Dec. 568. In *Yater v. Mullen*, 24 Ind. 277, a mill erected upon the land of another under an agreement that the landowner should not have a half interest in the same until a certain judgment, which was a lien upon the land, was discharged, was held not to pass to a purchaser of the land at an

§ 94. Levy on chattels annexed to the land.

Articles so annexed to the realty as to ordinarily be a part thereof cannot be levied upon as goods and chattels.⁶ But

execution sale. So, buildings temporarily annexed to the soil do not pass at an execution sale. *Tyler v. Decker*, 10 Cal. 436.

⁵ Carding machines, pickers, and a clothier's press, firmly fastened to the building. *Baker v. Davis*, 19 N. H. 325. A cotton gin in a gin house. *Latham v. Blakely*, 70 N. C. 368. A steam engine and boiler, shafting, and pulleys. *Keve v. Paxton*, 26 N. J. Eq. 107.

⁶ A church bell temporarily placed in a frame on a church lot was held a part of the realty, not subject to execution as personalty. *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511.

A railroad tank house, locomotive, and cars are a part of the realty, and not liable under an execution from the justice of the peace. *Titus v. Ginheimer*, 27 Ill. 462. So, a house built by a third party upon the owner's land. *Poche v. Theriot*, 23 La. Ann. 137. So, iron rolls in a rolling mill. *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490.

So, brick built by a contractor into the wall of a building, and afterwards piled in a heap on the owner's land, are a part of the realty. *Moore v. Cunningham*, 23 Ill. 328. So, boards used as a permanent floor in a corn barn, and fencing materials distributed about a farm for the purpose of constructing a fence. *Hackett v. Amsden*, 57 Vt. 432. So, a boiler in a brew house, constituting an essential part of the brewery. *Gray v. Holdship*, 17 Serg. & R. (Pa.) 413, 17 Am. Dec. 680. Cars, iron rails on a tramway, and scales used in mining, removing, and marketing limestone. *Ritchie v. McAllister*, 14 Pa. Co. Ct. R. 267. An engine, with its boiler and attachments, placed upon and securely attached to public land by the locator of a mining claim thereon. *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373. An engine driving a bark mill and pounders used to break hides in a tannery. *Oves v. Ogelsby*, 7 Watts (Pa.) 106. See, also, as to engines, *Walton v. Jarvis*, 13 U. C. Q. B. 616. The engine, boilers, cranes, cupola, and fan in a machine shop. *Rice v. Adams*, 4 Har. (Del.) 332. A building called a "shanty," with a chimney, door, and windows, divided into rooms, (314)

where, by express agreement, the character of personalty has been impressed upon the articles, or where the articles are removable by reason of an exception to the general law, a levy upon them as personalty is valid.⁷

§ 95. Tenant's fixtures.

Although the so-called "tenant's fixtures" are generally considered a part of the realty until severed,⁸ yet the rights and interest of a tenant are held subject to levy and sale as chattels on execution, so far as the tenant holds the right of removal;⁹ but a levying creditor of the tenant can acquire no greater rights by his levy than the tenant himself possessed.¹⁰ However, it seems that a levy upon the leasehold

and occupied by a family. *Fisher v. Saffer*, 1 E. D. Smith (N. Y.) 611. A cotton gin with stationary engine and press. *Jones v. Bull*, 85 Tex. 136. An engine running the machinery, a molding machine, and planing machines. *Green v. Phillips*, 26 Grat. (Va.) 752, 21 Am. Rep. 323. A partition of wood, nailed at the ends to blocks let through the plastering, and at the bottom to a strip of board nailed to the floor. *McAuliffe v. Mann*, 37 Mich. 539. Spike machines weighing two and a half tons, intended to be placed and permanently used in a rolling mill. *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894.

⁷ See post, notes 11, 12. See, also, chapter 5, "Agreements as to the Character of Fixtures."

⁸ See supra, c. 6, "Fixtures as between Landlord and Tenant"; § 31, "Nature and Application of the Rule," and notes 4-6.

⁹ *Morey v. Hoyt*, 62 Conn. 542; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Donnewald v. Turner Real-Estate Co.*, 44 Mo. App. 350; *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83; *Ombony v. Jones*, 19 N. Y. 234; *Lemar v. Miles*, 4 Watts (Pa.) 330; *Hey v. Bruner*, 61 Pa. 87; *Heffner v. Lewis*, 73 Pa. 302; *Darrah v. Baird*, 101 Pa. 265; *Kile v. Giebner*, 114 Pa. 381; *Wilkinson v. Kugler*, 153 Pa. 238; *Freeman v. Dawson*, 110 U. S. 264.

¹⁰ *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83.

interest of a tenant is effective in including and passing as realty tenant's fixtures.¹¹ Thus, in a California case, an engine, boiler, and other machinery in a flour mill, attached by a lessee upon his lessor's estate, were held to pass at an execution sale of the lessee's interest, despite an express agreement between the lessor and lessee granting the right of removal.¹²

§ 96. The effect of agreement.

Since articles annexed to the realty may be treated, by an express agreement of the parties, as personalty or otherwise, where the rights of innocent third parties will not be prejudiced, they are clearly subject to levy and sale on execution against their owner;¹³ but the fact that the articles so annexed are treated by agreement as personalty does not prevent their passing as realty in a levy upon the leasehold interest of the tenant.¹⁴ Articles, however, so removable by agreement, are not subject to levy and sale with the realty for the debts and liabilities of the landowner.¹⁵

§ 97. Severance.

It is not necessary that there be a severance of articles attached to the realty in order to make a valid levy and sale

¹¹ In *Kile v. Giebner*, 114 Pa. 381, it was held that the fixtures of a tenant might be levied upon as realty in connection with the lessee's interest in the realty.

¹² *McNally v. Connolly*, 70 Cal. 3.

¹³ *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; *State v. Bonham*, 18 Ind. 231; *Ashmun v. Williams*, 8 Pick. (Mass.) 402.

¹⁴ *McNally v. Connolly*, 70 Cal. 3.

¹⁵ *Beeston v. Marriott*, 9 Jur. (N. S.) 960.

of the articles as personalty.¹⁶ In fact, by an agreement, those fixtures which would ordinarily be treated as part of the realty may be sold as personalty at an execution sale.¹⁷ But a parol transfer of chattels annexed does not work a severance, so as to render them subject to levy and execution;¹⁸ nor does severance by accident or by an act of God, as the washing away by flood of a mill.¹⁹ Likewise, the execution creditor or levying officer cannot, by a wrongful severance of articles annexed to the realty, render them subject to the levy and execution.²⁰

§ 98. Time of annexation.

Articles annexed to the realty so as to be a part thereof pass by the sheriff's deed, even though attached after the sale.²¹

¹⁶ *Kile v. Giebner*, 114 Pa. 381, 7 Atl. 154. See ante, c. 4, on severance.

In *Pemberton v. King*, 2 Dev. (13 N. C.) 376, it was held that a levy and sale of a trade fixture without severance was a nullity, since a trade fixture was a part of the realty until severed, but this view does not seem to be advocated in any other case.

¹⁷ *Piper v. Martin*, 8 Pa. 207; *Mitchell v. Freedley*, 10 Pa. 198; *Burke v. Weiss*, 1 Kulp (Pa.) 310.

¹⁸ *Rice v. Adams*, 4 Har. (Del.) 332.

¹⁹ *Patton v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789; *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320.

²⁰ *Titus v. Mabee*, 25 Ill. 257; *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511.

²¹ *Hayes v. New York Gold Min. Co.*, 2 Colo. 273.

CHAPTER XIII.

FIXTURES AS BETWEEN THE OWNER OF THE REALTY AND A STRANGER TO TITLE.

§ 99. General rule.

100. Chattels annexed by the owner of the soil, and owned by another.
101. Fixtures annexed by a trespasser.
102. Fixtures annexed by an adverse possessor.
103. Annexation under mistake of title.
104. Annexation for public purpose.
105. Fixtures on public lands.
106. The effect of license.

§ 99. General rule.

The oft-repeated maxim, *Quicquid plantatur solo, solo cedit*, applies with literal strictness as between the owner of the realty and a stranger erecting fixtures thereon under no agreement, express or implied.¹ This rule is one of great

¹ Alabama: *Bolling v. Whittle*, 37 Ala. 35, 1 Ala. Sel. Cas. 265; *Mitchell v. Billingsley*, 17 Ala. 391; *Jones v. New Orleans & S. R. Co. & I. Ass'n*, 70 Ala. 227.

California: *Griffith v. Happersberger*, 86 Cal. 606.

Connecticut: *Benedict v. Benedict*, 5 Day, 464.

Illinois: *Dooley v. Crist*, 25 Ill. 551; *Dart v. Hercules*, 57 Ill. 446; *Salter v. Semple*, 71 Ill. 430; *Mathes v. Dobschuetz*, 72 Ill. 438; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

Indiana: *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, 10 Am. Rep. 56.

Kansas: *Rowand v. Anderson*, 33 Kan. 267, 52 Am. Rep. 529.

antiquity. Under the Roman civil law, it was provided that, "if a man builds upon his own land with the materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it."² The object of this provision was to prevent the necessity of buildings being pulled down. But it was provided that, where

Maine: *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320; *Hemenway v. Cutler*, 51 Me. 407; *Bonney v. Foss*, 62 Me. 248.

Maryland: *Baltimore v. McKim*, 3 Bland, 453.

Massachusetts: *Wells v. Banister*, 4 Mass. 514; *Washburn v. Sproat*, 16 Mass. 449; *Milton v. Colby*, 5 Metc. 78; *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57; *Poor v. Oakman*, 104 Mass. 309; *Webster v. Potter*, 105 Mass. 414; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Inhabitants of First Parish in Sudbury v. Jones*, 8 Cush. 184; *Murphy v. Marland*, 8 Cush. 575.

Mississippi: *Stillman v. Hamer*, 7 How. 421; *Terry v. Robins*, 5 Smedes & M. 291; *Emrich v. Ireland*, 55 Miss. 390.

Missouri: *Hunt v. Missouri Pac. Ry. Co.*, 76 Mo. 115.

New Hampshire: *Rand v. Dodge*, 17 N. H. 343.

New York: *In re Long Island R. Co.*, 6 Thomp. & C. 298; *Van Size v. Long Island R. Co.*, 3 Hun, 613; *Rowland v. Sworts*, 63 Hun, 625, 17 N. Y. Supp. 399; *Richtmyer v. Morss*, 4 Abb. App. Dec. 55; *Thayer v. Wright*, 4 Denio, 180; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356.

North Carolina: *Wentz v. Fincher*, 12 Ired. (34 N. C.) 297, 55 Am. Dec. 416; *Rives v. Dudley*, 3 Jones Eq. (56 N. C.) 126, 67 Am. Dec. 231.

Pennsylvania: *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; *City of Harrisburg v. Hope Fire Co.*, 2 Pears. 269; *Coheck v. George*, 2 Am. Law J. 258.

South Carolina: *Reid v. Kirk*, 12 Rich. Law, 54; *Caldwell v. Eneas*, 2 Mill. Const. 348, 12 Am. Dec. 681.

Tennessee: *Childress v. Wright*, 2 Cold. 350.

² "Cum in suo solo aliquis aliena materia aedificaverit, ipse dominus intelligitur aedificii, quia, omne quod in aedificatur solo cedit." Institutes of Justinian, bk. 1, § 29. "Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit jure naturali nostrum fit, quia superficies solo cedit." Institutes of Gaius, bk. 2, § 73. See, also, Bract. lib. 2, c. 24.

one built with his own materials upon the land of another, the building became the property of the owner of the freehold;³ and this, upon the presumption that the one annexing the chattel intended to make a gift of the same to the owner of the realty. The old civil law recognized a distinction between chattels annexed to the land of another by one who was in possession *bona fide* and without notice of adverse title and those erected by one who knew that he was not the owner of the soil; but the common law of England recognized no such distinction. The general holding was that chattels annexed by a stranger to title of the realty, whether attached knowingly, innocently, or through mistake, became a part of the realty.⁴ The rule in the United States upon this subject is similar to the common law.⁵

³ "Praeterea id quod in solo nostro ab aliquo aedificatum est quamvis ille suo nomine aedifici caverit, jure naturali nostrum fit, quia superficies solo cedit." Gail. 2, 73.

⁴ "Property accrues from the fraud and folly of another; as when persons, with an evil intent, or through ignorance, build with their own timbers on another's soil. The same may be applied to those who plant or engraft; also to those who sow their grain on another's land without the leave of the owner of the soil. The rule in such cases is that what is built, planted, and sown shall be the owner's of the soil, upon the presumption that they were given to him; for it has been said in these cases it would be a great encouragement to such builders, planters, or sowers if what was built, planted, and sown was not to belong to the owners of the soil, and especially if such structures are fixed, or the plants and seeds have taken root or nourishment. But if anyone perceives his folly, he may lawfully remove, so as he does it before our writ of prohibition comes against his removing anything, and before the timber is fastened with nails, or the trees have taken root." Britton, Pleas of the Crown, c. 33.

⁵ Alabama: Mitchell v. Billingsley, 17 Ala. 391; Bolling v. Whittle, 37 Ala. 35, 1 Ala. Sel. Cas. 268; Jones v. New Orleans & S. R. Co. & I. Ass'n, 70 Ala. 227.

§ 100. Chattels annexed by the owner of the soil, and owned by another.

Where erections or additions are made by the owner of the soil with the materials of another, the general rule is that

California: *Griffith v. Happersberger*, 86 Cal. 606.

Connecticut: *Benedict v. Benedict*, 5 Day, 464; *Beers v. St. John*, 16 Conn. 322.

Illinois: *Moore v. Cunningham*, 23 Ill. 328; *Dooley v. Crist*, 25 Ill. 551; *Dart v. Hercules*, 57 Ill. 446; *Salter v. Sample*, 71 Ill. 430; *Mathes v. Dobschuetz*, 72 Ill. 438; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

Indiana: *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, 10 Am. Rep. 56.

Iowa: *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

Kansas: *Rowand v. Anderson*, 33 Kan. 267, 52 Am. Rep. 529.

Maine: *Goddard v. Bolster*, 6 Me. 427, 20 Am. Dec. 320; *Hemenway v. Cutler*, 51 Me. 407; *Bonney v. Foss*, 62 Me. 248.

Massachusetts: *Wells v. Banister*, 4 Mass. 514; *Washburn v. Sproat*, 16 Mass. 449; *Milton v. Colby*, 5 Metc. 78; *Oakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57; *Poor v. Oakman*, 104 Mass. 309; *Webster v. Potter*, 105 Mass. 414; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Inhabitants of First Parish in Sudbury v. Jones*, 8 Cush. 184; *Murphy v. Marland*, 8 Cush. 575.

Minnesota: *Mitchell v. Bridgman*, 71 Minn. 360, 74 N. W. 142.

Mississippi: *Stillman v. Hamer*, 7 How. 421; *Terry v. Robins*, 5 Smedes & M. 291; *Emrich v. Ireland*, 55 Miss. 390.

Missouri: *Climer v. Wallace*, 28 Mo. 556; *Hunt v. Missouri Pac. Ry. Co.*, 76 Mo. 115.

Nevada: *Treadway v. Sharon*, 7 Nev. 37.

New Hampshire: *Rand v. Dodge*, 17 N. H. 343.

New York: *In re Long Island R. Co.*, 6 Thomp. & C. 298; *Van Size v. Long Island R. Co.*, 3 Hun, 613; *Rowland v. Sworts*, 63 Hun, 625, 17 N. Y. Supp. 399; *Richtmyer v. Morss*, 4 Abb. App. Dec. 55; *Thayer v. Wright*, 4 Denio, 180; *Fisher v. Saffer*, 1 E. D. Smith, 611; *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356.

North Carolina: *Wentz v. Fincher*, 12 Ired. (34 N. C.) 297, 55 Am. Dec. 416; *Rives v. Dudley*, 3 Jones Eq. (56 N. C.) 126, 67 Am. Dec. 231.

Pennsylvania: *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; *City*

the same remain personal property, and may be retaken by their owner, so long as the identity of the original materials can be proved.⁶

§ 101. Fixtures annexed by a trespasser.

Articles attached to the realty by one who is a trespasser, and who has no right, title, or interest therein, are a part of the realty.⁷ The articles are dedicated, in law, to the owner of the freehold. The reason for this rule is obvious; for, like him who sows where he cannot reap, the trespasser can obtain no advantage by his wrong, and, having affixed his

of *Harrisburg v. Hope Fire Co.*, 2 Pears. 269; *Coheck v. George*, 2 Am. Law J. 258.

South Carolina: *Reid v. Kirk*, 12 Rich. Law, 54; *Caldwell v. Eneas*, 2 Mill, Const. 348, 12 Am. Dec. 681.

Tennessee: *Childress v. Wright*, 2 Cold. 350.

Wisconsin: *Huebschmann v. McHenry*, 29 Wis. 655.

⁶ Thus, a bar or pole wrongfully taken and used in making a staging, to shingle a barn, and attached to the freehold by simply being nailed, was held removable by its owner as against the owner of the land who annexed it. *White v. Twitchell*, 25 Vt. 620. See, also, *Cross v. Marston*, 17 Vt. 533; *Perkins v. Bailey*, 99 Mass. 61. But if an owner of the realty should take a quantity of bricks and erect them into a house or other structure, these bricks would have lost their legal identity as chattels, and would be incapable of removal by their rightful owner, even though physically capable of being restored to their original condition. *Moore v. Cunningham*, 23 Ill. 328; *Peiree v. Goddard*, 22 Pick. (Mass.) 559. See post, c. 14, § 110, "Replevin," notes 67-70.

⁷ *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658.

Where the owner of signs consisting of heavy posts 16 feet in length, sunk into the ground about 5 feet, with double braces against the wind, and being from 100 to 200 feet in length, attached the same to the realty without the consent of the owner thereof, it was held that the signs were a part of the realty. *Jacoby v. Johnson*, 56 C. C. A. 637, 120 Fed. 487.

chattels to the realty, they become part of it, and he cannot add further injury by tearing them down.⁸

§ 102. Fixtures annexed by an adverse possessor.

The general rule is that an adverse possessor of the land, who annexes chattels thereto, so as to become a part of the land, does so at his peril, and has no right to remove them, or claim compensation for improvements.⁹ In fact, such annexations by an adverse possessor do not furnish a sufficient consideration to support an express promise by the rightful owner of the land to pay for the same.¹⁰

§ 103. Annexation under mistake of title.

The fact that chattels have been annexed to the freehold by one under a mistake as to his title, or to his rights therein, ordinarily gives him no rights of removal.¹¹ This is the uniform rule where the mistake is unilateral, or without the

⁸ A part of the opinion of the court in *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28.

⁹ A building erected upon land of another under a claim of right adverse to the true owner is a part of the freehold as against the true owner of the same. *Huebschmann v. McHenry*, 29 Wis. 655.

Where land is entered upon for purpose of getting title by adverse possession, and a wooden building set upon posts is erected by the adverse possessor, the building becomes a part of the realty. *Doscher v. Blackiston*, 7 Or. 143. See 3 Cent. Law J. 701.

¹⁰ *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272.

¹¹ *Burlerson v. Teeple*, 2 G. Greene (Iowa) 542; *Dutton v. Ensley*, 21 Ind. App. 46, 51 N. E. 380; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284; *Mitchell v. Bridgman*, 71 Minn. 360, 74 N. W. 142; *Climer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Stillman v. Hamer*, 7 How. (Miss.) 421; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170; *Honzik v. Delaglisse*, 65 Wis. 501, 56 Am. Rep. 634.

fault, knowledge, or acquiescence of the owner of the realty. This question arises frequently between adjoining freeholders, where a house or other building is erected upon the land of another under a mistaken belief as to the title, or where partition fences are placed upon the property of another through mistake as to the dividing line. Generally, such erections become a part of the realty.¹² But where there is a mutual mistake between adjoining freeholders, or where the annexation of the chattel is with the knowledge and without the objection of the rightful owner of the realty, the

¹² A person erected a rail fence by mistake upon land of the United States, which was afterwards sold by the United States to an innocent third party, and it was held that the fence went with the realty. *Seymour v. Watson*, 5 Blatchf. (Ind.) 555, 36 Am. Dec. 556.

In the case of *Mitchell v. Bridgman*, 71 Minn. 360, 74 N. W. 142, the defendant erected a house upon the lot of another by mistake, supposing that this lot was his own, and it was decided that the house became a part of the realty.

A fence built by mistake on the land of the United States is a fixture, and passes by sale of the land. *Burlerson v. Teeple*, 2 G. Greene (Iowa) 542.

Where adjoining landowners agree to put up a line fence, each to own the portion put up by him, and by mistake the fence built by one was located upon the soil of another, it was held that the fence so located passed, upon sale of the land, to an innocent purchaser. *Climmer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135.

In *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170, where a fence was built by one person as a permanent addition, without any agreement as to removal, the builder believing that he was erecting it upon his own land, it was held that the same became a part of the realty. But where a dwelling house is placed in the street upon wooden shoes extending the entire length of the building, under a permit from the city to remove within thirty days, and, by mistake, the building extends upon an adjoining lot, it is removable. *Page v. Urick*, 31 Wash. 601.

rule is that a license to remove the chattel will be implied.¹³ So, where a fixture is attached to the realty through a fraud of the owner of the realty, the chattel does not become a part thereof;¹⁴ but an article annexed through mistake, on account of the fraud of the pretended owner of the realty, is irremovable.¹⁵

¹³ But in *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284, where a railroad company dug a well, and put in a pump and boiler, upon the land of another under a mistaken belief as to the ownership thereof, it was held that, since the machinery was placed upon the premises solely for the purpose of better operating its railroad, and not for the purpose of ultimately improving the real estate, the same did not become a part of the realty.

In *Lowenberg v. Bernd*, 47 Mo. 297, it was held that, where one erects a building or fence on the land of an adjoining owner under a mistake, shared in by the other, as to the proper division line, and with the knowledge of, and without objection from, the other, he may remove the fixture, on the theory that the erection was under a license.

In *Hines v. Ament*, 43 Mo. 298, a person placed his fence upon another's land by mistake, and allowed it to remain there by consent of the owner for fifteen years. The owner of the realty finally ordered it to be removed, and shortly afterwards carried it away himself. The fence was held to be personalty. So, in *Matson v. Calhoun*, 44 Mo. 368, a rail fence was constructed by mistake upon the land of another with the license of the owner, and it was determined to be personalty.

In *Brown v. Baldwin*, 121 Mo. 126, where, pending a dispute as to the title to land, portable machinery was placed thereon by one of the claimants, with the acquiescence of the other, the latter could not claim it as part of the freehold.

¹⁴ *Matson v. Calhoun*, 44 Mo. 368.

¹⁵ In *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446, it was held that where, under a contract with the husband, the plaintiff placed a gas manufacturing machine in the house of a married woman, supposing the house to belong to the husband, the machine became

§ 104. Annexation for public purpose.

The general rule regarding articles annexed by a stranger to title as a part of the realty is modified in respect to fixtures erected upon the land of another for public or *quasi* public purposes. Thus, where the government or a corporation, under the right of eminent domain, enters upon one's land before its condemnation, with the consent or license of the owner, and erects fixtures or improvements thereon, they do not become a part of the realty;¹⁶ and the weight of authority is to the same effect where the public or *quasi* public corporation enters upon one's land before condemnation, without right and authority from the landowner.¹⁷ This

a part of the realty and hence the plaintiff could not recover it on rescinding the contract for the husband's fraud.

In equity, where one makes improvements innocently, or through mistake, upon the land of another, he will not ordinarily be allowed to enforce a claim for reimbursement as an actor. *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

¹⁶ *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273; *Indiana, B. & W. Ry. Co. v. Allen*, 100 Ind. 409; *Morgan v. Chicago & N. E. R. Co.*, 39 Mich. 675; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450, 14 Am. Ry. Rep. 202.

¹⁷ *Alabama: Jones v. New Orleans & S. R. Co. & I. Ass'n*, 70 Ala. 227.

Arkansas: Newgass v. St. Louis, A. & T. Ry. Co., 54 Ark. 140.

California: California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 59, 20 Am. & Eng. R. Cas. 309; *California Pac. R. Co. v. Armstrong*, 46 Cal. 85, 7 Am. Ry. Rep. 259; *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246; *Albion River R. Co. v. Hesser*, 84 Cal. 435.

Florida: Jacksonville, T. & K. W. Ry. Co. v. Adams, 28 Fla. 631, 51 Am. & Eng. R. Cas. 544.

Illinois: Emerson v. Western Union R. Co., 75 Ill. 176; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273.

holding is based upon the distinction existing between a mere trespasser annexing to the realty of another and a railroad company possessing the right to enter on another's land to build a railroad for a public use. The trespasser is presumed to have dedicated his annexations to the freehold. No such inference can be drawn as to the annexation of a railroad, for it has only an easement, and can take no freehold title.¹⁸ But where the entry of the public or *quasi* public

Iowa: *Daniels v. Chicago, I. & N. R. Co.*, 41 Iowa, 52.

Michigan: *Toledo, A. A. & G. T. Ry. Co. v. Dunlap*, 4 Mich. 456, 5 Am. & Eng. R. Cas. 378; *Morgan v. Chicago & N. E. R. Co.*, 39 Mich. 675.

Minnesota: *Greve v. First Div. of St. Paul & P. R. Co.*, 26 Minn. 66.

Mississippi: *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380, 56 Am. Rep. 809.

New Jersey: *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450, 14 Am. Ry. Rep. 202.

New York: *Black River & M. R. Co. v. Barnard*, 9 Hun, 104.

North Carolina: *Burgess v. Clark*, 13 Ired. (35 N. C.) 109.

Oregon: *Oregon Ry. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321.

Pennsylvania: *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28.

Wisconsin: *Lyon v. Green Bay & M. Ry. Co.*, 42 Wis. 538, 15 Am. Ry. Rep. 91; *Aspinwall v. Chicago & N. W. Ry. Co.*, 41 Wis. 474.

¹⁸ In *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. 28, where a railroad entered upon another's land, before condemnation, without the owner's consent, the court said: "The company being a trespasser, and the entry not in conformity to law, the question is whether this irregular proceeding operated as a dedication in law of the property in the ties and rails to the owners of the land, so as to entitle them to include these things in the assessment of the damages under the railroad law, and recover their value as an accession to the value of the land taken by the company. A careful consideration and analysis of the case before us will show that it differs in essential respects from that of a mere tortfeasor, whose

corporation is wholly wrongful, the chattels annexed become a part of the realty.¹⁹

structures upon the land of another inure to the benefit of the owner of the land. The common-law rule is undoubted that a trespasser who builds on another's land dedicates his structures to the owner. The reason is obvious, for, like him who sows where he cannot reap, he can obtain no advantage by his wrong, and, having affixed his chattels to the realty, they become a part of it, and he cannot add further injury by tearing them down. * * * There is also to be noticed a clear distinction between putting down a railroad track under a lease, and an act of appropriation of the land under a charter. * * * The very intent of an appropriation of land is to place upon it and own and use the structures necessary to carry out the charter purpose; hence, no dedication of the material can be inferred in such a case. * * * This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. * * * Another evident difference between a mere tortfeasor and a railroad company is this: the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and, when its proper use of the easement ceases, the franchise is at an end. There is no intention, in fact, to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit: the right to enter on the land under authority of law, to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry."

¹⁹ United States v. Certain Tract of Land in Monterey County, 47 (358)

§ 105. Fixtures on public lands.

The general rule applies to chattels annexed by one upon public lands, and fixtures so made pass to a subsequent purchaser of the realty.²⁰

§ 106. The effect of license.

Although the annexation of a chattel to the freehold by a mere stranger ordinarily makes it a part thereof, yet, where erections are made by one having no estate in the land, by the permission or license of the owner of the land, an agreement that structures shall remain the property of the person making them will be implied, in the absence of any other facts or circumstances tending to show a different intention;²¹ but after the license is determined, the licensee must remove the chattels annexed by him within a reasonable time, or his right to claim the same will be lost.²² So, in

Cal. 515; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340; *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, 10 Am. Rep. 56; *Matter of Long Island R. Co.*, 6 Thomp. & C. (N. Y.) 298; *Matter of New York, W. S. & B. Ry. Co.*, 37 Hun (N. Y.) 317.

²⁰ *Mitchell v. Billingsley*, 17 Ala. 391; *Graham v. Roark*, 23 Ark. 19; *Merritt v. Judd*, 14 Cal. 59; *McKiernan v. Hesse*, 51 Cal. 594; *Griffith v. Happersberger*, 86 Cal. 606; *Blair v. Worley*, 2 Ill. 178; *Seymour v. Watson*, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; *Burler son v. Teeple*, 2 G. Greene (Iowa) 542; *Marcy v. Darling*, 8 Pick. (Mass.) 283; *Treadway v. Sharon*, 7 Nev. 37.

²¹ *Merchants' Nat. Bank of Crookston v. Stanton*, 55 Minn. 211, 56 N. W. 821; *Howard v. Fessenden*, 14 Allen (Mass.) 124.

²² *Turner v. Kennedy*, 57 Minn. 104, 58 N. W. 823. As between licensor and licensee, it is held that a building erected on the land of another, with permission to use the land at the pleasure of the owner thereof, does not become a part of the realty until, after reasonable notice to remove has been given, it is suffered to remain *Salley v. Robinson*, 96 Me. 474, 52 Atl. 930.

A structure placed upon land of another, to be used by the build-

cases of fences or buildings built by an adjoining landowner upon the property of another through a mutual mistake as to the division line, a license granting removal will be implied.²³

er during the pleasure of the owner of the land, the ownership of the structure by the builder, and his right to remove it when the land owner revokes his license, is recognized and implied. The same principle applies when a part of the structure or plant is under the ground. Thus, where water pipes were laid in defendant's land, and conveyed water for domestic purposes to the house of the plaintiff from springs on the former's land, it was held that the defendant could not claim the pipes as a part of the realty without first having given to the plaintiff a reasonable notice to remove. *Salley v. Robinson*, 96 Me. 474, 52 Atl. 930.

²³ *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. 500.

CHAPTER XIV.

REMEDIES.

- § 107. Waste.
- 108. Trespass.
 - (a) Trespass *quare clausum fregit*.
 - (b) Trespass *de bonis asportatis*.
- 109. Trover—Generally.
 - (a) Agreement.
 - (b) Tortious severance.
 - (c) Adverse possession.
 - (d) Mortgagor and mortgagee.
 - (e) Landlord and tenant.
- 110. Replevin—Generally.
 - (a) Agreement.
 - (b) Tortious severance.
 - (c) Mortgagor and mortgagee.
 - (d) Adverse possession.
 - (e) Landlord and tenant.
- 111. Injunction—Generally.
 - (a) Adverse possession.
 - (b) Trespass.
 - (c) Mortgagor and mortgagee.
 - (d) Landlord and tenant.
- 112. Criminal remedies.
 - (a) Larceny.
 - (b) Malicious injury or mischief.
 - (c) Willful trespass.

§ 107. Waste.

At the early common law, the remedy universally invoked, in cases where fixtures were removed or destroyed, was the action of waste. This was a mixed action, being real to the extent of the judgment for recovery of the realty, and personal in regard to the damages recovered for the injuries

caused by the waste.¹ In its early form, this action arose between parties holding a particular estate in land and those entitled to an estate of inheritance, and it was necessary that there exist a privity of estate between the parties in order that it might lie.² Lord Coke thus states the rule at the common law: "At the common law, waste was punishable in three persons, viz., tenant in dower, tenant by the curtesy, and the guardian, but not against the tenant for life, or tenant for years; and the reason of the diversity was for that the law created their estates and interests, and therefore the law gave against them remedy; but tenant for life and for years came in by demise and lease of the owner of the land, etc., and therefore he might, in his demise, provide against the doing of waste by his lessee, and, if he did not, it was his negligence and default."³

In its earlier form, no one could maintain the action of waste unless he had an immediate estate of inheritance upon the determination of the estate in dower or curtesy, without any interposing vested freehold;⁴ but in its later use it has grown and broadened so that it now lies against any person or class of persons who wrongfully removes fixtures from the freehold.⁵ The modern action of waste is quite comprehen-

¹ *Stevens v. Rose*, 69 Mich. 259.

² *Baker v. Johnson*, 2 Marv. (Del.) 219; *Foot v. Dickinson*, 2 Metc. (Mass.) 611; *Bates v. Shraeder*, 13 Johns. (N. Y.) 260; *Browne v. Blick*, 3 Murph. (7 N. C.) 511; *Williams v. Lanier*, Busb. (44 N. C.) 31; *Patterson v. Cunliffe*, 11 Phila. (Pa.) 564, 32 Leg. Int. 398; *Walker's Case*, 3 Coke, 23; *Wilford v. Rose*, 2 Root (Conn.) 20.

³ 2 Coke, Inst. 299.

⁴ *Comyn, Digest*, "Waste," c. 2; *Co. Litt.* 218b, note 122.

⁵ *Holmberg v. Johnson*, 45 Kan. 197; *Sapp v. Roberts*, 18 Neb. 299; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Lander v. Hall*, 69 Wis. 326.

sive in its character, and partakes of many forms, but in connection with fixtures it has practically fallen into disuse, and has been superseded by the action of trover, replevin, and injunction. At the common law, there were two remedies for waste,—one by the writ of waste, where the injury had actually been done; the other by writ of prohibition and estrepement, where the commission of waste was threatened.⁶

The former remedy, or writ of waste, as it anciently existed at the common law, was early superseded by an action on the case in the nature of waste. This action was found much more convenient and better adapted for the recovery of mere damages than the action of waste in the tenuit. It is more comprehensive, and applies to many cases where an action of waste formerly would not lie. Thus, an action on the case may be sustained by a reversioner against a stranger for damage actually done to the reversionary estate while in the possession and occupation of a tenant, whereas the action of waste in such a case would not lie.⁷ So, an action on the case in the nature of waste has been brought by a mortgagee of an estate for years, as reversioner, against the assignee in bankruptcy of the tenant for years, for the removal of fixtures from the premises.⁸ So, the action has been held to lie even in those cases where a mortgage is considered to be

⁶ 1 Washburn, Real Property (5th Ed.) p. 156; 2 Coke, Inst. 299.

⁷ Chase v. Hazelton, 7 N. H. 171; Ewell, Fixtures, p. 394. This action on a case in the United States appears to have been used in a few cases, although the remedies usually employed at the present day are those above referred to.

⁸ Hitchman v. Walton, 4 Mees. & W. 409; Gooding v. Shea, 103 Mass. 360.

only a security, by a mortgagee against a mortgagor, for acts of waste impairing the security.⁹

The latter remedy, or, rather, remedies,—the writ of prohibition and the writ of estrepement,—were preventive in their nature; the former lying for prohibition of threatened waste against those persons who were, by the common law, punishable for waste,¹⁰ and the latter lying, after judgment obtained in any real action, and before possession was obtained by the sheriff, to prevent waste on the part of the tenant.¹¹ These preventive remedies, however, are now practically obsolete, and are almost entirely superseded by the modern action of injunction.

§ 108. Trespass.

Since trespass, in its usual legal acceptation, is a wrong done with force to the person, property, or rights of another, the action is applicable to fixtures as a means of redressing an injury to real property, or for damage to personalty.¹²

⁹ *Van Pelt v. McGraw*, 4 N. Y. 110; *Robinson v. Russell*, 24 Cal. 467; *Smith v. Altick*, 24 Ohio St. 369.

¹⁰ *Jefferson v. Durham*, 1 Bos. & P. 105; 2 Coke, Inst. 299.

¹¹ “‘Estrepement’ is an old French word, signifying the same as ‘waste’ or ‘extirpation;’ and the writ of estrepement lay at the common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But, as in some cases, the demandant may be justly apprehensive that the tenant may make waste or estrepement pending the suit, well knowing the weakness of his title; therefore the statute of Gloucester gave another writ of estrepement pendente placito, commanding the sheriff firmly to inhibit the tenant, ‘Ne faciat vastum vel estrepementum pendente placito dicto indiscusso.’” 3 Bl. Comm. 225.

¹² Where an assignee of a mortgagor removes fixtures from the
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— (a) **Trespass quare clausum fregit.**

The action of *quare clausum fregit* is the remedy applied for a violent or forcible injury to the real property;¹³ but where this remedy is chosen, the party plaintiff must be one

land, though erected by him after the execution of the mortgage, the assignee of the mortgagee may have an action of trespass against them for their value. *Smith v. Goodwin*, 2 Me. 173.

A person in possession of mortgaged land under an equity of redemption would be liable to the mortgagee in trespass if he removed buildings on the land which were fixtures. *Humphreys v. Newman*, 51 Me. 40.

Where occupants of public land erected a saw mill, placing therein an engine, boiler, etc., but failed to take any steps towards securing a title to the land, and the land was subsequently sold to other parties, subsequent to which sale the former occupants removed the mill, it was held that in so doing they were guilty of trespass. *Treadway v. Sharon*, 7 Nev. 37.

A person in possession of a certain freehold, by requesting another to remove from it fixtures which are a part of the realty, subjects himself to an action of trespass brought by the owner of the freehold. *Morgan v. Varick*, 8 Wend. (N. Y.) 587.

¹³ Trespass *quare clausum* is the proper form of action for an agricultural society to bring against its president, who, without authority, has sold a barn standing on its realty, and who enters with the purchaser, and tears down and removes the building. *Kent County Agricultural Soc. v. Ide*, 128 Mich. 423, 87 N. W. 369, 8 Detroit Leg. News, 708.

An action of trespass *quare clausum* is maintainable for the severance and removal of a pump so affixed to the land as to become a fixture, where the entry, severance, and removal are one continuous act. *Barnes v. Burt*, 38 Conn. 541.

Manure made upon premises in the usual course of husbandry is a fixture, and an action of trespass *quare clausum fregit* will lie for its removal by an outgoing tenant. *Vehue v. Mosher*, 76 Me. 469, 26 Am. & Eng. Enc. Law (1st Ed.) p. 615; *Uttendorffer v. Saegers*, 50 Cal. 496; *Scott v. Bay*, 3 Md. 431.

who had possession in fact of the realty when the alleged trespass was committed.¹⁴ Thus, one who has leased his lands for years, or even at will, cannot maintain trespass against a stranger for injury to the possession while in the actual occupation of his tenant.¹⁵ But in some cases it has been held that the action will lie by the owner of land which is in the possession of his tenant at will for the removal or destruction of buildings that are fixtures, where the permanent value of the property will be affected.¹⁶ So, it appears that a mortgagee who is entitled to the immediate possession of the realty can maintain trespass *quare clausum* for the removal of the building and fixture by the mortgagor,

¹⁴ *Taylor v. Townsend*, 8 Mass. 411 (trespass *quare clausum* for removal of buildings by mortgagee in possession); *Wickham v. Freeman*, 12 Johns. (N. Y.) 183 (trespass *quare clausum* by plaintiff's lessor against lessee, holding over after expiration of his term, for carrying away corn, etc.).

A lessor cannot maintain an action of trespass *quare clausum fregit* against a subtenant at will of the lessee for taking down and carrying away a house erected by him on the demised premises during the term. *Tobey v. Webster*, 3 Johns. (N. Y.) 468.

¹⁵ A lessor cannot maintain *quare clausum fregit* against a stranger for cutting down and carrying away trees while there is a tenant in possession. This action can be maintained only by the person who has the possession in fact of the land. *Campbell v. Arnold*, 1 Johns. (N. Y.) 511.

¹⁶ In the case of the destruction of a house occupied by a tenant at will, the injury is direct and immediate to the owner. It puts an end to the estate, and deprives him of the rents and profits by a forcible act. No one but himself can recover the value of the property destroyed. There seems to be no reason why he shall not maintain an action so suitable to his purposes as trespass. *Starr v. Jackson*, 11 Mass. 519. So, where the land is unoccupied, the owner may maintain trespass *quare clausum*. *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262.

or one under authority from him.¹⁷ As applied to fixtures, it will lie for tearing down a dwelling house and outbuildings, and carrying away the materials of which they were built;¹⁸ so, where the dwelling house of the plaintiff is destroyed by blasted rocks and stones being thrown thereon.¹⁹ Likewise, the action will lie, by a tenant who did not consent, for the unauthorized severance and removal, by his cotenant, of machinery constituting fixtures in a sash and blind factory.²⁰ But a landlord cannot maintain this action against a tenant for his wrongful severance of fixtures during the term,²¹ nor even against a stranger, while the tenant is in possession,²² for possession is the gist of the action;²³ nor

¹⁷ Trespass lies by a mortgagee against one who, under authority from the mortgagor, removes a building erected on the land by the mortgagor after the execution of the mortgage. *Cole v. Stewart*, 11 Cush. (Mass.) 181. But a mortgagee, not having possession or the right to the possession of the mortgaged premises, cannot maintain the action of trespass *quare clausum* as against a stranger for breaking and entering the premises and removing fixtures. *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Page v. Robinson*, 10 Cush. (Mass.) 99; *Woodman v. Francis*, 14 Allen (Mass.) 198.

¹⁸ *Uttendorffer v. Saegers*, 50 Cal. 496.

¹⁹ *Scott v. Bay*, 3 Md. 431.

²⁰ *Symonds v. Harris*, 51 Me. 14; *Sparks v. Leavy*, 19 Abb. Pr. (N. Y.) 364.

²¹ *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422; *Tobey v. Webster*, 3 Johns. (N. Y.) 468.

²² *Gibbons v. Dillingham*, 10 Ark. 9; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511.

²³ In trespass *quare clausum*, the gist of the action is the breaking and entering of the plaintiff's close, and all other averments in the declaration are incidental to that allegation, and, where inserted, are only by way of aggravation of the principal injury. They are not essential to the maintenance of the action, and can be proved only as affecting the amount of damages. *Knapp v. Slocomb*, 9

will the action lie in favor of a vendee of the realty who holds under an agreement of sale, and while not yet in actual possession, for the removal of fixtures by the vendor.²⁴ In such cases, apparently, the proper remedy, if sought by trespass, is an action on the case in the nature of waste.²⁵

— (b) Trespass de bonis asportatis.

As applied to fixtures, the action of trespass *de bonis asportatis* will lie for taking and carrying away fixtures after a severance from the realty.²⁶ The gist of the action is the wrongful taking and carrying away of articles which are personalty.²⁷ By a wrongful severance, the owner of the realty may elect to treat the articles severed as personalty, and bring an action of trespass *de bonis*, or he may sue for damages to the realty by trespass *quare clausum*.²⁸ Formerly it was doubted whether the action would lie where the

Gray (Mass.) 73; Sullivan v. Clements, 1 Colo. 261; Halligan v. Chicago & R. I. R. Co., 15 Ill. 558; Fitzpatrick v. Gebhart, 7 Kan. 35; Smith v. Wilson, 1 Dev. & B. (18 N. C.) 40; Stahl v. Grover, 80 Wis. 650.

²⁴ Tabor v. Robinson, 36 Barb. (N. Y.) 483.

²⁵ Campbell v. Arnold, 1 Johns. (N. Y.) 511; Tobey v. Webster, 3 Johns. (N. Y.) 468.

Where a tenant is in possession, the owner may sue in trespass on the case for the damage to his reversionary interest. Russell v. Meyer, 7 N. D. 335, 75 N. W. 262.

²⁶ Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Ricker v. Kelly, 1 Me. 117, 10 Am. Dec. 38; Van Brunt v. Schenck, 11 Johns. (N. Y.) 377.

²⁷ Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

²⁸ Gardner v. Finley, 19 Barb. (N. Y.) 317. A tortfeasor has no right to complain of the form of the remedy. Laffin v. Griffiths, 35 Barb. (N. Y.) 58; Barnes v. Burt, 38 Conn. 541; Anderson v. Buckton, 1 Strange, 192.

severance and abstraction of the fixture were one continued act, but it is now well settled that the action can be maintained upon any wrongful severance of the fixture.²⁹ To maintain the action, the party in whom the property right is vested need not be in actual possession of the realty at the time of the severance.³⁰ Thus, the owner of land in the possession of a tenant can maintain trespass *de bonis* against a stranger for taking and carrying away fixtures.³¹ So, the landlord may maintain the action against his tenant for the wrongful removal of fixtures by the tenant during the term.³²

²⁹ "In a very early case before the English court of king's bench it is said that the court agreed, 'if a lessee for years cuts down timber trees and lets them lie, and afterwards carries them away, so that the taking and carrying away be not as one continued act, but that there be some time for the distinct property of a divided chattel to settle in the lessor, that an action of trespass *vi et armis* would lie in such case against the lessee, and that in such case felony might be committed of them, but not where they were taken and carried away at the same time.' *Udal v. Udal*, Aleyn, 82. From this it might be inferred that an action of trespass *de bonis asportatis* for the removal of fixtures after their severance could be maintained in a case where the severance and removal are one continued act." Tyler, *Fixtures*, p. 743. But "the distinction, so far as it applies to the action of trespass *de bonis asportatis* or trover, seems entirely too subtle and refined ever to be generally adopted, and does not seem, in fact, to have been alluded to or adopted in subsequent cases, though circumstances raising the question must have frequently happened." Ewell, *Fixtures*, p. 424.

³⁰ It has been long settled that actual possession is not necessary to enable the owner to maintain trespass or trover, as it respects personal property. For an injury done to a personal chattel, the person who has the general property, provided he is entitled to immediate possession, may support this action, although he has never had actual possession. *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 377.

³¹ *Bulkley v. Dolbeare*, 7 Conn. 232; *Ward v. Andrews*, 2 Chit. 636.

³² *Schermerhorn v. Buell*, 4 Denio (N. Y.) 422.

A tenant may also maintain this form of action against a tortfeasor for the asportation of his tenant's fixtures.³³ And it has been held that the tenant may maintain the action as against a wrongdoer, even though he has no right of removal of the fixtures severed.³⁴

§ 109. Trover—Generally.

The action of trover is the remedy universally employed to recover the value of fixtures unlawfully taken or retained. Trespass *de bonis asportatis* and trover are generally concurrent remedies, but the latter is much more extensive in its application, and hence more frequently chosen.³⁵ Thus,

³³ *Miller v. Baker* (1840) 1 Metc. (Mass.) 27, 3 Law R. 148. In this case the tenant had sold and delivered nursery trees, etc., while rooted in the ground, to the plaintiff, and after such sale they were levied upon on an execution against the tenant, and kept by the officer rooted in the greenhouse and garden, no one being permitted to remove them; and this taking them into possession, and excluding the owner from the lawful exercise of his rights over them, was treated as a conversion sufficient to warrant trespass *de bonis*, the trees, etc., being considered mere personal chattels.

³⁴ *Hitchman v. Walton*, 4 Mees. & W. 409; *Boydell v. McMichael*, 1 Crompt., M. & R. 177.

³⁵ The distinction between these forms of actions is brought out in the case of *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780, where action was brought for the wrongful severance in removal of fixtures. The court there said: "The plaintiff might, it is true, have made the wrongful entry of the defendant the gist of his action, and have brought trespass *quare clausum*; * * * but he had a right to qualify the tort by waiving the wrongful entry, and rely only upon the wrongful taking and carrying away. He might have still further waived the wrongful taking and carrying away, and have sued in trover for the conversion alone; since, where the whole merits of a case are discussed and determined in one action, the judgment may be pleaded and shown in evidence in bar to another.

trover will lie for wrongful taking, for illegal assuming, for illegal using, or for wrongfully detaining chattels.³⁶ In trespass, however, the gist of the action is the unlawful taking and disturbing of the plaintiff's possession by force.³⁷ Trover lies for the conversion of personalty only,³⁸—it is not the proper remedy for an injury to real estate as such;³⁹ hence, as applied to fixtures, the action will lie only for those fixtures which are considered and treated as personalty. So, generally, the action cannot be maintained as to fixtures so long as they are annexed to, and constitute a part of, the realty, and have not been severed therefrom.⁴⁰

It is not for the defendant to complain that the plaintiff has waived some portion of his legal rights. He is certainly in no worse condition than if they had been insisted upon. Trover and trespass are generally concurrent remedies for the unlawful taking and conversion of personal property."

³⁶ *Glaze v. McMillion*, 7 Port. (Ala.) 279; *Davis v. Hurt*, 114 Ala. 146; *Race v. Chandler*, 15 Ill. App. 532; *Tinker v. Morrill*, 39 Vt. 477, 94 Am. Dec. 345; *Thorp v. Robbins*, 68 Vt. 53.

Where a contract permits the using of certain fixtures for six months, if the second party remains in business so long, a purchaser of the assignee of such second party, withholding the fixtures from the real owner after demand therefor, is guilty of conversion. *Foster Woolen Co. v. Wollman*, 87 Mo. App. 658.

³⁷ 21 Enc. Pl. & Pr. p. 1014.

³⁸ *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Jewett v. Patridge*, 12 Me. 243, 28 Am. Dec. 173; *Ekstrom v. Hall*, 90 Me. 186; *Geirke v. Schwartz*, 20 Misc. Rep. (N. Y.) 361; *Branch v. Morrison*, 5 Jones (50 N. C.) 16, 69 Am. Dec. 770.

³⁹ *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11.

⁴⁰ *Thweat v. Stamps*, 67 Ala. 98; *Donnelly v. Thieben*, 9 Ill. App. 495; *Leman v. Best*, 30 Ill. App. 323; *Richardson v. Copeland*, 6 Gray (Mass.) 536; *Peirce v. Goddard*, 22 Pick. (Mass.) 559; *Guthrie v. Jones*, 108 Mass. 191; *Raddin v. Arnold*, 116 Mass. 270; *Stout v. Stoppel*, 30 Minn. 56; *Shapira v. Barney*, 30 Minn. 59; *Prescott v.*

— (a) Agreement.

But where chattels are so annexed to the realty as to be, in their nature, personalty, or where, by agreement, express or implied, the character of personalty is impressed upon them, trover will lie.⁴¹ In such cases, actual severance and asportation of the articles annexed are unnecessary in order to constitute conversion, as the things in question are already personalty, and hence the application of the action is to be determined by the general rules of law pertinent thereto.⁴²

Wells, Fargo & Co., 3 Nev. 82; *Overton v. Williston*, 31 Pa. 155; *Darrah v. Baird*, 101 Pa. 265.

Where a mortgagor removed a dwelling house from the mortgaged premises, and used the materials, with others, in constructing a house upon another lot of land belonging to him, which house and lot he afterwards sold, it was held that, since the materials became a part of the freehold, the right of property therein vested in the grantee of the land, and that therefore trover could not be maintained by the mortgagee against the grantee, either for the new house or for the old materials used in its construction. *Peirce v. Goddard*, 22 Pick. (Mass.) 559.

⁴¹ *Powers v. Harris*, 68 Ala. 409; *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532; *Hilborne v. Brown*, 12 Me. 162; *Fuller v. Tabor*, 39 Me. 519; *Adams v. Goddard*, 48 Me. 212; *Walker v. Schindel*, 58 Md. 360; *Hinckley v. Baxter*, 13 Allen (Mass.) 139; *Harris v. Scovel*, 85 Mich. 32, 48 N. W. 173; *Stout v. Stoppel*, 30 Minn. 56; *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Smith v. Benson*, 1 Hill (N. Y.) 176; *Farrar v. Chauffetete*, 5 Denio (N. Y.) 527.

⁴² To permit the action of trover to lie, actual severance and asportation are not necessary, a prevention of removal being sufficient. *Walker v. Schindel*, 58 Md. 360; *Shapira v. Barney*, 30 Minn. 59; *Hilborne v. Brown*, 12 Me. 162; *Smith v. Benson*, 1 Hill (N. Y.) 176; *Tapley v. Smith*, 18 Me. 12.

Thus, the action will lie for the conversion of a house or other structure attached to the soil but regarded as personalty by agreement of the parties.⁴³ So, it can be maintained in cases of conditional sales of articles which have been annexed to the realty, so as to ordinarily become a part thereof, where, by an agreement, title thereto is retained in the vendor, and they are to be regarded as personalty until the purchase price therefor has been paid.⁴⁴

— (b) Tortious severance.

By a wrongful severance of articles annexed which are a part of the realty, the owner of the freehold, to whom they belong before severance, may, at his option, treat them as personalty, and bring the action of trover therefor;⁴⁵ but in

⁴³ *Parker v. Goddard*, 39 Me. 144; *Davis v. Buffum*, 51 Me. 160; *Stout v. Stoppel*, 30 Minn. 56; *Shapira v. Barney*, 30 Minn. 59; *Dame v. Dame*, 38 N. H. 433.

Thus, where, upon the land of another, a house is built under an express agreement that the same shall remain the property of the builder, trover can be maintained against the owner for conversion of the lumber of the house. *Powers v. Harris*, 68 Ala. 400.

So, where a purchaser bought land of two partners, with knowledge of a prior agreement between them, by which one placed on the land distilling apparatus, upon condition that it remain his personal property, it was held that the purchaser was liable in trover for a conversion of the apparatus, though no actual severance had been made. *Walker v. Schindel*, 58 Md. 360. See, also, *Smith v. Benson*, 1 Hill (N. Y.) 176.

⁴⁴ *Davis v. Taylor*, 41 Ill. 405; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. 1061.

⁴⁵ *Bly v. United States*, 4 Dill. 464, Fed. Cas. No. 1,581; *Sampson v. Hammond*, 4 Cal. 184; *Greenebaum v. Taylor*, 102 Cal. 624; *Omaha & Grant Smelting & Refining Co. v. Tabor*, 13 Colo. 41; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Strickland v. Parker*, 54 Me. 263; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Moody v. Whitney*,

this connection it is to be observed that the mere act of severance will not permit the action to lie,—there must be a subsequent asportation, or some unlawful act of dominion over the chattel severed, to the exclusion of the owner's right.⁴⁶ Thus rule, however, is subject to the qualification that, where a fixture becomes personalty by a tortious severance, the action of trover will lie only so long as the separate identity of the detached fixture, as such, can be ascertained. Conversion will not lie after the fixture becomes annexed to and a part of some other realty,⁴⁷—that is, the

34 Me. 563; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; *Winchester v. Craig*, 33 Mich. 205; *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426; *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364; *Mooers v. Wait*, 3 Wend. (N. Y.) 104; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Yates v. French*, 25 Wis. 661; *Noble v. Sylvester*, 42 Vt. 146; *Tobias v. Francis*, 3 Vt. 425, 23 Am. Dec. 217; *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *Westgate v. Wixon*, 128 Mass. 304.

⁴⁶ *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Moody v. Whitney*, 34 Me. 563; *Strickland v. Parker*, 54 Me. 263.

A severance alone, without a taking, is insufficient to maintain the action. Addison, Torts, § 467.

In *American Union Telegraph Co. v. Middleton*, 80 N. Y. 408, where the defendant had cut telegraph poles on the highway, and had carried them to the side fence on the road, and had there left them, it was held that, since the severance and the conversion were one continuous and uninterrupted transaction, the proper form of action was trespass *quare clausum fregit*, and trover would not lie.

⁴⁷ Where machinery, although obtained by fraud, is put in a mill and attached to the realty, the use of it is not a conversion for which trover would lie. *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233.

Where ties were taken by a contractor in building a railroad, and the road was in use before being delivered to the company, an ac-
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rule apparently is that, where a fixture is tortiously severed, and there is a subsequent annexation of the same to the realty of another, who is without knowledge of the tortious act, trover will not lie, for the reason that there can be no conversion of real property; but where the fixture has been tortiously severed, and has been subsequently annexed to the real estate of the wrongdoer, or to the real estate of the one who is cognizant of the tortious act, trover will lie, for the reason that there is in fact a conversion of chattel property.⁴⁸

— (c) **Adverse possession.**

Where one who holds the realty adversely, in good faith, under claim and color of title, severs fixtures therefrom, the rightful owner, out of possession, cannot maintain trover,⁴⁹ for a personal action cannot be made the means of litigating

tion of trover could not be maintained against the company for their conversion, as they had become realty. *Detroit & B. C. R. Co. v. Busch*, 43 Mich. 571. Nor could the action be maintained against one who, without notice, had purchased real property, a part of which had been sold by his vendor as personalty, with a stipulation that the title should not pass until it was paid for, but which had been allowed to be made a part of the realty. It was so held, where a man bought a mill without notice, in which the water wheels attached were subject to such arrangement. *Knowlton v. Johnson*, 37 Mich. 47.

⁴⁸ *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Salter v. Sample*, 71 Ill. 430; *Dorr v. Dudderar*, 88 Ill. 107; *Ricketts v. Dorrel*, 55 Ind. 470; *Shoemaker v. Simpson*, 16 Kan. 43; *Central Branch R. Co. v. Fritz*, 20 Kan. 430; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49; *McDaniel v. Lipp*, 41 Neb. 713; *Huebschmann v. McHenry*, 29 Wis. 655; *Peirce v. Goddard*, 22 Pick. (Mass.) 559.

⁴⁹ *Hutchins v. King*, 1 Wall. (U. S.) 53; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Mather v. Trinity Church*, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663; *Powell v. Smith*, 2 Watts (Pa.) 126; *Darrah v. Baird*, 101 Pa. 265; *Thropp's Appeal*, 70 Pa. 395.

and determining the title to the real property, as between conflicting claimants;⁵⁰ but a mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action.⁵¹

— (d) **Mortgagor and mortgagee.**

In those states where a mortgage is considered as a conveyance of the fee, the mortgagee may maintain the action of trover against the mortgagor, or those claiming under him, for the tortious severance of fixtures from the mortgaged premises, the same as the owner thereof might against any wrongdoer;⁵² but in those states where a mortgage is considered merely as a security, it is held that the mortgagee must

⁵⁰ In *Halleck v. Mixer*, 16 Cal. 574, the court said: "The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title; in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. But the rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is, as we have already observed, upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must, of course, be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action."

⁵¹ *Halleck v. Mixer*, 16 Cal. 574.

⁵² *Dorr v. Dudderar*, 88 Ill. 107; *Smith v. Goodwin*, 2 Me. 173; *Gore v. Jenness*, 19 Me. 53; *Hemenway v. Bassett*, 13 Gray (Mass.) 378; *Peirce v. Goddard*, 22 Pick. (Mass.) 559; *Burnside v. Twitchell*, 43 N. H. 390.

seek his remedy in equity for the wrongful severance and removal of fixtures.⁵³

— (e) Landlord and tenant.

The landlord may maintain the action of trover for any tortious severance of fixtures by the tenant, or those claiming under him; during or after the expiration of the tenancy;⁵⁴ and the action likewise lies in favor of the landlord against any other party in possession or tortfeasor.⁵⁵ As against a third party who tortiously severs fixtures from the demised premises, the tenant in possession has, during his tenancy, a sufficient interest in the fixtures annexed, whether they be tenant's or otherwise, to enable him to maintain trover.⁵⁶ But it has been held, where tenant's fixtures are considered a part of the realty, that trover will not lie against the landlord by the tenant while the fixtures are annexed;⁵⁷

⁵³ *Vanderslice v. Knapp*, 20 Kan. 647; *Alexander v. Shonyo*, 20 Kan. 705; *Peterson v. Clark*, 15 Johns. (N. Y.) 205.

⁵⁴ A landlord may maintain trover against the tenant or his vendee to recover fixtures wrongfully severed from the demised property by the tenant. *Morgan v. Negley*, 3 Pittsb. (Pa.) 33.

"A tenant who has the use and not the dominion of property demises; and therefore, when he separates any part of it to convert it from a chattel real to a chattel personal, the property in the thing reverts to the owner of the fee, who has the right to the immediate possession of it. And if the tenant wrongfully uses or disposes of it, or commits any act tantamount to a conversion, he is liable in trover." 26 Am. & Eng. Enc. Law (1st Ed.) p. 775, note; *Harlan v. Harlan*, 15 Pa. 507.

⁵⁵ *Union Bank v. Emerson*, 15 Mass. 159; *McNally v. Connolly*, 70 Cal. 3; *Westgate v. Wixon*, 128 Mass. 304.

⁵⁶ *Boydell v. McMichael*, 3 Tyrw. 974; *Hitchman v. Walton*, 4 Mees. & W. 409.

⁵⁷ *Mackintosh v. Trotter*, 3 Mees. & W. 184; *Minshall v. Lloyd*, 2

but the more logical rule, and the one which the majority of the courts at the present day are following, is that, where the right of removal of fixtures exists in favor of the tenant, the same are to be considered personalty, even though annexed, and hence any wrongful act or refusal on the part of the landlord to permit the removal of the tenant's fixtures amounts to a conversion for which trover will lie.⁵⁸ How-

Mees. & W. 450; Guthrie v. Jones, 108 Mass. 191; Brown v. Wallis, 115 Mass. 156; Raddin v. Arnold, 116 Mass. 270.

⁵⁸ In *Stout v. Stoppel*, 30 Minn. 56, the court said: "The general rule which obtains where the common-law distinctions between the different forms of action are preserved undoubtedly is that replevin or trover will not lie for anything attached to the realty. This proceeds upon the theory that it ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty, and that replevin or trover will only lie for a chattel. It may well be doubted whether the more sensible, as well as logical, rule would not have been that, whenever the right of removal exists, the fixture retains its chattel nature, even during annexation, and that, therefore, trover or replevin would lie, even before severance from the realty, in favor of him having the right of removal against the owner of the realty, who, upon demand, refuses him permission to enter and remove." See, also, *Shapira v. Barney*, 30 Minn. 59.

In *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393, where a tenant had erected certain trade fixtures, consisting of shafting, belts, pulleys, and a brick chimney, the landlord was held liable in conversion for refusing to allow the tenant to remove the same. See, also, *Miller v. Baker*, 1 Metc. (Mass.) 27; *Vilas v. Mason*, 25 Wis. 310 (hotel fixtures); *Finney v. Watkins*, 13 Mo. 291 (hydraulic press); *Rosenau v. Syring*, 25 Or. 386. But the mere making of a deed by the landlord during the term of the tenant will not support the action of trover for the tenant's fixtures. *Walsh v. Sichler*, 20 Mo. App. 374. Nor is the suing out of an injunction to prevent the removal of fixtures by a tenant a conversion thereof. *Bircher v. Parker*, 40 Mo. 118. But the landlord is not liable in an action of trover for re-

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ever, after a tenant's right of removal has expired, the action will not lie for fixtures left annexed.⁵⁹

§ 110. Replevin—Generally.

The action of replevin is also a personal action, and the general rules and principles applicable to the action of trover, in connection with fixtures, are also applicable to replevin.⁶⁰ The gist of the action is the plaintiff's right to immediate possession of the property at the commencement of the suit.⁶¹ It differs from trover and trespass, in that it lies for the recovery of the specific property, and not for damages.⁶² Replevin will not lie for articles annexed to the realty so as to constitute a part thereof.⁶³

fusing to deliver fixtures belonging to a tenant before he surrendered possession of the premises, on demand of the tenant, made after the landlord had leased the premises, and delivered possession to another tenant, since the landlord was not at fault for the first tenant's failure to remove them, and any demand therefor should be made of the lessee in possession. *Peck v. Knox*, 1 *Sweeny* (N. Y.) 311.

A tenant may maintain trover against the landlord for his tenant's fixtures which he was unable to remove before the expiration of his tenancy on account of the wrongful acts of the landlord. *Watts v. Lehman*, 107 Pa. 106.

⁵⁹ *Stockwell v. Marks*, 17 Me. 455; *Davis v. Buffum*, 51 Me. 160; *Peck v. Knox*, 1 *Sweeny* (N. Y.) 311; *Darrah v. Baird*, 101 Pa. 265; *Preston v. Briggs*, 16 Vt. 129.

⁶⁰ See ante, § 109, "Trover."

⁶¹ 18 Enc. Pl. & Pr. p. 497.

⁶² 20 Am. & Eng. Enc. Law (1st Ed.) p. 1045; 18 Enc. Pl. & Pr. p. 497; *Hunt v. Robinson*, 11 Cal. 262; *Thomas v. Spofford*, 46 Me. 408.

⁶³ *Leman v. Best*, 30 Ill. App. 323; *Hacker v. Munroe*, 56 Ill. App. 532; *Ricketts v. Dorrel*, 55 Ind. 470; *Smith v. Stanford*, 62 Ind. 392; *McAuliffe v. Mann*, 37 Mich. 539; *Cresson v. Stout*, 17 Johns. (N.

—— (a) **Agreement.**

Where fixtures are so annexed to the realty as to ordinarily become a part thereof, but, by an agreement, express or implied, retain their character of personalty, they may be recovered by an action of replevin, although there has in fact been no severance or asportation;⁶⁴ that is, replevin is essentially a personal action, and it will lie for the recovery of a fixture just so long as the article can be identified as personalty.⁶⁵

—— (b) **Tortious severance.**

Where the fixture annexed to the freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty, and recover the same by the action of replevin.⁶⁶ This rule, however, is subject to the limitation

Y.) 116, 8 Am. Dec. 373; *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71; *Vausse v. Russel*, 2 McCord (S. C.) 329.

⁶⁴ *Hensley v. Brodie*, 16 Ark. 511; *Ott v. Specht*, 8 Houst. (Del.) 61; *Foy v. Reddick*, 31 Ind. 414 (house built on street by mistake); *Hartwell v. Kelly*, 117 Mass. 235; *Weathersby v. Sleeper*, 42 Miss. 732; *Hines v. Ament*, 43 Mo. 298; *Fitzgerald v. Anderson*, 81 Wis. 341.

A building or other fixture which is ordinarily a part of the realty is personalty when placed on the land of another by contract or by consent of the owner. Such building or fixture may therefore be made the subject of an action of replevin. *Weathersby v. Sleeper*, 42 Miss. 732; *Mills v. Redick*, 1 Neb. 437.

⁶⁵ *Ricketts v. Dorrel*, 55 Ind. 470 (fence rails and stakes).

⁶⁶ *Sands v. Pfeiffer*, 10 Cal. 259; *Kimball v. Lohmas*, 31 Cal. 154; *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Matzon v. Griffin*, 78 Ill. 477; *Davis v. Easley*, 13 Ill. 192; *Salter v. Sample*, 71 Ill. 430; *Dorr v. Dudderar*, 88 Ill. 107; *Hull v. Hull*, 1 Idaho, 361; *Balliett v. Humphreys*, 78 Ind. 388; *Congregational Soc. of Dubuque v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511 (church bell); *Richardson v.*
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that, where an article is made personalty, replevin can be maintained only so long as the separate identity of the article can be ascertained, but not after it becomes annexed to and a part of any realty.⁶⁷ Thus, it has been held that the action of replevin will not lie where there is a tortious severance of the fixture, and a subsequent annexation to the realty of another, so as to become a part thereof.⁶⁸ There has been some doubt expressed as to whether the action would lie where fixtures were tortiously severed by the tortfeasor, and were by him annexed to his freehold;⁶⁹ but it seems

York (1837) 14 Me. 216; *Tudor Iron Works v. Hitt*, 49 Mo. App. 472; *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58; *Cresson v. Stout*, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; *Johnson v. Elwood*, 53 N. Y. 431; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612 (machinery in a factory); *Brewer v. Fleming*, 51 Pa. 102; *Christian v. Dripps* (1857) 28 Pa. 278; *Snyder v. Vaux* (1830) 2 Rawle (Pa.) 423; *Heaton v. Findlay* (1849) 12 Pa. 307; *Huebschmann v. McHenry*, 29 Wis. 655; *Kirch v. Davies*, 55 Wis. 287.

⁶⁷ *Ricketts v. Dorrel*, 55 Ind. 470.

⁶⁸ Where the owner of a lot sold it by parol contract of one year, and the purchaser erected a frame house thereon, placed upon pillars, as a residence, and, before the expiration of the year, sold the house to another, who removed it to another lot, and there placed it upon brick pillars, sunk into the ground, and built an addition to it, it was held that the house was a part of the realty when it became fixed upon the brick pillars of the second lot, and hence replevin would not lie. *Salter v. Sample*, 71 Ill. 430.

⁶⁹ In *Dorr v. Dudderar*, 88 Ill. 107, it was held that, where a house is wrongfully removed from mortgaged premises, replevin would not lie in favor of the mortgagee after it had been permanently attached to other real estate, for the reason that replevin is not the proper remedy to recover real property. So, in *Ricketts v. Dorrel*, 55 Ind. 470, it was held that a rail fence wrongfully removed and placed as a standing fence on the land of the wrongdoer could not be recovered by replevin. See, also, *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Salter v. Sample*, 71 Ill. 430; *Shoemaker v. Simpson*,

clearly settled that, where the fixture tortiously severed has in fact and in law become a part of the realty of another, the action of replevin will not lie,⁷⁰ and this is the rule, for the sole reason that replevin is not the proper remedy to recover real property.⁷¹

— (c) **Mortgagor and mortgagee.**

In those states where a mortgage is considered as a conveyance of the fee, the mortgagee may maintain the action of replevin against the mortgagor, or those claiming under him, for the tortious severance of fixtures from the mortgaged premises, the same as the owner thereof might against any wrongdoer.⁷² In these cases the mortgagee's right of action is based upon his legal title under the mortgage to the premises and the fixtures thereto annexed.^{72a} So, where a house has been severed from mortgaged premises without the consent of the mortgagee, he may maintain replevin for its recovery at any time before it becomes attached to and forms a part of other realty.⁷³ But in those states where a mort-

16 Kan. 43; *Central Branch R. Co. v. Fritz*, 20 Kan. 430; *Michigan Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49; *Mills v. Redick*, 1 Neb. 437; *McDaniel v. Lipp*, 41 Neb. 713; *Huebschmann v. McHenry*, 29 Wis. 655.

⁷⁰ *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Salter v. Sample*, 71 Ill. 430; *Dorr v. Dudderar*, 88 Ill. 107; *Ricketts v. Dorrel*, 55 Ind. 470; *McDaniel v. Lipp*, 41 Neb. 713; *Huebschmann v. McHenry*, 29 Wis. 655; *Gill v. De Armant*, 90 Mich. 425, 51 N. W. 527.

⁷¹ *Dorr v. Dudderar*, 88 Ill. 107.

⁷² *Smith v. Goodwin*, 2 Me. 173; *Gore v. Jenness*, 19 Me. 53; *Hemenway v. Bassett*, 13 Gray (Mass.) 378.

^{72a} *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206; *Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763.

⁷³ *Dorr v. Dudderar*, 88 Ill. 107. So, where, after the foreclosure (382)

gage is regarded merely as a personal lien to secure a debt, and not as a conveyance, the right of the mortgagee to maintain replevin for fixtures wrongfully severed and removed from the mortgaged premises is denied;⁷⁴ for in these states the only right of action that the mortgagee possesses is in respect to the damages occasioned or to be occasioned by the impairment of his security,^{74a} and for this, the remedy of the mortgagee is not replevin to recover the fixture severed, but a suit in equity to restrain the commission of waste,^{74b} or an action on the case for damages sustained upon his security.^{74c}

of a mortgage, the mortgagor wrongfully removes a house from the mortgaged premises, the purchaser, having the legal title, may maintain replevin for it. *Matzon v. Griffin*, 78 Ill. 477.

⁷⁴A mortgagee cannot maintain replevin for fixtures fraudulently sold by the mortgagor, his remedy for a severance and a removal which affects the mortgaged premises being an action in equity. *Vanderslice v. Knapp*, 20 Kan. 647; *Alexander v. Shonyo*, 20 Kan. 705.

Where a mortgage is due, but the mortgagee has not taken possession, he cannot maintain replevin for specific chattels severed from the realty by the mortgagor, which, before severance, were fixtures, and subject to the mortgage, the mortgage being regarded not a conveyance. *Kircher v. Schalk*, 39 N. J. Law, 335.

Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; *Clark v. Reyburn*, 1 Kan. 281; *Harris v. Bannon*, 78 Ky. 568; *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Woehler v. Endter*, 46 Wis. 301, 1 N. W. 329, 50 N. W. 1099, 8 Cent. Law J. 325.

^{74a}*Van Pelt v. McGraw*, 4 N. Y. 110; *Schalk v. Kingsley*, 42 N. J. Law, 32. See post, § 111c, "Mortgagor and Mortgagee," and notes 104, 105.

^{74b}*Vanderslice v. Knapp*, 20 Kan. 647; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206. See post, § 111b, "Mortgagor and Mortgagee."

^{74c}*Jackson v. Turrell*, 39 N. J. Law, 329; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206.

— (d) **Adverse possession.**

But, as in the case of the personal action of trover, where one who holds the realty adversely, in good faith, under claim and color of title, severs fixtures therefrom, the rightful owner, out of possession, cannot maintain replevin;⁷⁵ for a personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants.⁷⁶ As a Pennsylvania court says: "It is not the actual possession, but it is the actual adverse possession of a person who claims title to it, that is the criterion. * * * The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried

⁷⁵ In *Halleck v. Mixer*, 16 Cal. 574, the court said: "The plaintiff out of possession cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title; in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. But the rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is, as we have already observed, upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must, of course, be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action." *Anderson v. Hapler*, 34 Ill. 438, 85 Am. Dec. 318; *Rathbone v. Boyd*, 30 Kan. 485; *Baker v. Campbell*, 32 Mo. App. 529; *Powell v. Smith*, 2 Watts (Pa.) 126; *Harlan v. Harlan*, 15 Pa. 507, 53 Am. Dec. 612; *Kimball v. Lohmas*, 31 Cal. 154; *Page v. Fowler*, 39 Cal. 412.

⁷⁶ *Halleck v. Mixer*, 16 Cal. 574.

in another form.”⁷⁷ But a mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action.⁷⁸

⁷⁷ Harlan v. Harlan, 15 Pa. 507.

⁷⁸ Halleck v. Mixer, 16 Cal. 574.

In *Kimball v. Lohmas*, 31 Cal. 154, the court said: “Adverse possession is of different kinds: First, where the possession is taken by bow and spear, without color of title, but with the intent to claim the fee exclusive of any other right, and to hold it against all comers, which is the kind found in the present cases; second, where the possession is taken under a claim of title founded upon a written instrument, as a conveyance, or upon the decree or judgment of a court of competent jurisdiction. The first is sufficient to put the statute of limitations in motion, and, at the expiration of five years, vests in the usurper a right under the statute which is equivalent to title; but until the statute has run, he is, as to the true owner, a mere intruder, without right. It cannot be said in any just sense that, as between him and the true owner, a case of conflicting title is presented, until the statute has run, or that, until then, there can be, as between them, any substantial contest as to the title. But as to the other or second kind of adverse possession, the case is otherwise. There the possession is accompanied by at least a colorable title, and an actual and substantial contest as to the title must arise whenever the party out of possession undertakes to assert his rights in any kind of action, for they occupy the position of conflicting claimants as to the true title, and not as to the possession only. Where the defendant is in possession as a naked trespasser, and his right rests only upon a bald assertion, which merely suffices to put the statute of limitations in motion, he is not in a position to contest the title of the plaintiff in such a sense as to defeat a personal action; for, notwithstanding he may have alleged title in himself, it turns out to be false, and at the outcome it is made clear that title, although apparently a fact in issue, is so in no just sense, but only in seeming, and is in fact only exhibited by the plaintiff collaterally for the purpose of proving his right to the property in suit.”

— (e) Landlord and tenant.

Where fixtures are tortiously severed from the freehold by the tenant without the consent of the owner thereof, the landlord may treat, at his option, the fixtures severed as personalty, and maintain an action of replevin therefor.⁷⁹ In those states where tenant's fixtures, while annexed, are considered a part of the realty, replevin will not lie by a tenant or his assignee against the landlord for the same so long as they remain annexed.⁸⁰ But perhaps the more logical rule is that, where the right of removal exists, the chattel retains its chattel nature even during annexation, and hence the tenant may maintain replevin for the wrongful refusal of the landlord to permit the tenant to remove his fixtures.⁸¹

§ 111. Injunction—Generally.

For preventing and restraining injuries to the realty, or to fixtures a part thereof, formerly, at the common law, there existed a writ of prohibition which issued out of chancery against those persons punishable at the common law for waste.⁸² The common law also afforded another preventive

⁷⁹ *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318 (one hundred cords of wood); *Hamilton v. Stewart*, 59 Ill. 330 (replevin for saloon fixtures); *Ballou v. Jones*, 37 Ill. 95 (replevin for portable buildings by tenant). But a landlord may maintain replevin for chattels wrongfully severed from the freehold by a tenant, since the title to the land is not thereby in question. *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332 (house removed on other premises but not a part thereof).

⁸⁰ *Brown v. Wallis*, 115 Mass. 156; *Folger v. Kenner*, 24 La. Ann. 436.

⁸¹ *Stout v. Stoppel*, 30 Minn. 56.

⁸² See *Goodeson v. Gallatin*, Dickens, 455, where this writ was cor.
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remedy by the writ of estrepement, which originally lay at common law only after judgment in a real action, but, by subsequent statutory extension, it was applied to all cases in which waste was being committed *pendente lite*.⁸³ These remedies, as applied to fixtures, have been almost entirely superseded in modern times by the equitable remedy of injunction.⁸⁴ It is much broader than the remedies at law, and is available in many cases to prevent waste, where there is no remedy at law.⁸⁵ Generally, the remedy by injunction may be invoked only where the remedy at law is imperfect or wholly denied, or where the injury, threatened or continuing, is such that a preventive remedy is necessary to avoid irreparable injury to the freehold or fixtures;⁸⁶ and in this connection, the mere allegation in the complaint of irremedial damage or irreparable mischief is insufficient.

sidered by Lord Bathurst as the origin of the jurisdiction of the court of equity to administer preventive relief by injunction.

⁸³ " 'Estrepement' is an old French word, signifying the same as waste or extirpation; and the writ of estrepement lay at the common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But, as in some cases, the demandant may be justly apprehensive that the tenant may make waste or estrepement pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester gave another writ of estrepement *pendente placito* [waste pending the suit], commanding the sheriff firmly to inhibit the tenant, 'Ne faciat vastum vel estrepementum *pendente placito dicto indiscusso*.' " 3 Bl. Comm. 225.

⁸⁴ The writ of estrepement is still in use in Pennsylvania. Brightly, *Purd. Dig.* (1894) p. 2079; *Jones v. Whitehead*, 1 *Pars. Sel. Eq. Cas. (Pa.)* 304; *Hensal v. Wright*, 10 *Pa. Co. Ct. R.* 416.

⁸⁵ Thus, where there is a lease without impeachment of waste. 22 *Enc. Pl. & Pr.* p. 1117.

⁸⁶ 22 *Enc. Pl. & Pr.* p. 1118.

The facts must be pleaded so as to show to the court a merited apprehension of the damage or injury anticipated.⁸⁷ It is a preventive, rather than a remedial, action, and hence is inapplicable to injuries which have been already committed.⁸⁸ Relief by injunction can generally be granted only for injuries to fixtures while they are so annexed to the realty as to be a part thereof,—a constructive annexation being sufficient.⁸⁹ Ordinarily, injunction will not lie for articles annexed which, by reason of an agreement, or of the character of their use, are treated by the parties as personalty; and this is the rule, for the reason that there is generally an adequate remedy at law.⁹⁰ Thus, an injunction is usually sought in equity on the ground of a threatened injury to the freehold in the nature of waste.⁹¹

— (a) **Adverse possession.**

But, in general, the owner of the freehold, out of possession, cannot maintain an injunction suit for the removal of fixtures against one holding the premises adversely and in good faith.⁹² A court of equity will ordinarily compel the plaintiff to establish his title in an action at law.⁹³

⁸⁷ *Waldron v. Marsh*, 5 Cal. 119; *Branch Turnpike Co. v. Board Sup'rs Yuba County*, 13 Cal. 190; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *White v. Flannigain*, 1 Md. 525; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Green v. Keen*, 4 Md. 98.

⁸⁸ *Southard v. Morris Canal & Banking Co.*, 1 N. J. Eq. 518; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169.

⁸⁹ *Titus v. Mabee*, 25 Ill. 257; *Titus v. Ginheimer*, 27 Ill. 462.

⁹⁰ *Sunderland v. Newton*, 3 Sim. 450.

⁹¹ *Kimpton v. Eve*, 2 Ves. & B. 349.

⁹² *Poindexter v. Henderson*, Walk. (Miss.) 176; *Nevitt v. Gillespie*, 1 How. (Miss.) 108; *Bogey v. Shute*, 4 Jones Eq. (57 N. C.) 174; *Storm v. Mann*, 4 Johns. Ch. (N. Y.) 21.

⁹³ 1 High, *Injunctions*, § 354 et seq.

— (b) **Trespass.**

It is now well settled that injunction will lie against a trespasser for threatened injury to the freehold in the nature of waste.⁹⁴ Formerly, injunctive relief was sought exclusively for the purpose of restraining waste, and, in such cases, privity of title was an essential ground for interference by a court of equity.⁹⁵ But the equitable jurisdiction has been gradually enlarged, so that injunction will now lie in cases of trespass where there is no privity, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation.⁹⁶ Thus, it lies to prevent the removal of buildings,⁹⁷ of fruit trees and ornamental shrubbery,⁹⁸ and of timber standing and attached to the realty.⁹⁹

— (c) **Mortgagor and mortgagee.**

As between a mortgagee and a mortgagor in possession,

⁹⁴ 1 High, Injunctions, p. 452.

⁹⁵ Ewell, Fixtures, p. 406; 1 High, Injunctions, p. 452.

⁹⁶ Minnig's Appeal, 82 Pa. 373; *Jordan v. Lanier*, 73 N. C. 90; 1 High, Injunctions, *supra*.

⁹⁷ Injunction will lie to prevent removal of a building used as an office by a trespasser in connection with a mill. *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310. But injunction will not lie to prevent the removal of a church building, where the act is a mere trespass, and there is adequate remedy at law. *Tigard v. Moffitt*, 13 Neb. 565, 14 N. W. 534.

⁹⁸ *Jackson v. Cator*, 5 Ves. 688.

As between vendor and vendee of the realty, where the vendor claims certain fruit trees and ornamental shrubbery in a nursery by virtue of a parol reservation in the deed, injunction is the proper remedy to prevent their removal by the vendor. *Smith v. Price*, 39 Ill. 28.

⁹⁹ *Fulton v. Harman*, 44 Md. 251; *Stevens v. Beekman*, 1 Johns. Ch. (N. Y.) 318.

equity will restrain, by injunction, the removal or destruction of fixtures on the mortgaged premises, where the effect of such act or acts is to render the mortgage security inadequate.¹⁰⁰ Thus, injunction lies to prevent the severance and removal from the mortgaged real estate of a frame building which forms a part of the realty, and which the mortgagor has conveyed to a purchaser, who is seeking its removal, the mortgagee's remedy at law affording no adequate relief.¹⁰¹ In those states where a mortgage is considered as a conveyance of the realty, injunction, apparently, will lie for any threatened act of the mortgagor which tends to impair the whole of the mortgaged security.¹⁰² And this rule obtains, for the reason that in equity the mortgagee is considered as the owner of the fee, and hence entitled to all the rights and remedies which the law gives to any owner.¹⁰³ But in those states where a mortgage is considered, not as a conveyance of the fee, but only as a security for the debt, equity will restrain by injunction the threatened acts of the mortgagor only when they tend to render inadequate the mortgage security.¹⁰⁴ And the principle upon which relief

¹⁰⁰ *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Brown v. Stewart*, 1 Md. Ch. 87; *State v. Northern Central Ry. Co.*, 18 Md. 193; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164; *Bunker v. Locke*, 15 Wis. 635; *Ensign v. Colburn*, 11 Paige (N. Y.) 503; *Robinson v. Russell*, 24 Cal. 467; *Harris v. Bannon*, 78 Ky. 568; *Hoskin v. Woodward*, 45 Pa. 42.

¹⁰¹ *State Sav. Bank v. Kercheval*, 65 Mo. 682.

¹⁰² *Nelson v. Pinegar*, 30 Ill. 473; *State v. Northern Central Ry. Co.*, 18 Md. 193; *Robinson v. Litton*, 3 Atk. 210; *Gooding v. Shea*, 103 Mass. 360; *Byrom v. Chapin*, 113 Mass. 308; *Dudley v. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368; *Smith v. Goodwin*, 2 Me. 173; *Hoskin v. Woodward*, 45 Pa. 42.

¹⁰³ *Nelson v. Pinegar*, 30 Ill. 473.

¹⁰⁴ *Robinson v. Russell*, 24 Cal. 467; *Perrine v. Marsden*, 34 Cal. 14;

is granted is to prevent the destruction of the security of the debt.¹⁰⁵ Likewise, injunction will lie in favor of a holder of a contract in the nature of a mortgage.¹⁰⁶

— (d) **Landlord and tenant.**

A landlord may maintain injunction against his tenant or the assignee of the tenant to restrain the removal of fixtures from the demised premises, where it appears that irreparable injury to the realty will result.¹⁰⁷ So, an injunction may properly be granted to a landlord to restrain the removal of certain trade fixtures from the demised premises pending a suit involving the right of removal, to preserve the status of the parties until the question of ownership can be determined;¹⁰⁸ but injunction will not lie in favor of the landlord,

Cooper v. Davis, 15 Conn. 556; Clark v. Reyburn, 1 Kan. 281; Hutchins v. King, 1 Wall. (U. S.) 53; Hoskin v. Woodward, 45 Pa. 42; 13 Am. & Eng. Enc. Law (2d Ed.) p. 618, note 1; Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Matzon v. Griffin, 78 Ill. 477; Vanderslice v. Knapp, 20 Kan. 647; Citizens' Bank v. Knapp, 22 La. Ann. 117; Jackson v. Turrell, 39 N. J. Law, 329; Kircher v. Schalk, 39 N. J. Law, 335; Franks v. Cravens, 6 W. Va. 185; Schalk v. Kingsley, 42 N. J. Law, 32.

¹⁰⁵ Cooper v. Davis, 15 Conn. 556; Nelson v. Pinegar, 30 Ill. 473; Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148.

¹⁰⁶ Where it is shown, in a proceeding to foreclose a contract, that part of the machinery and fixtures included in the contract and covered by the lien has been removed from the premises, and has been levied upon under judgments and proceedings in attachment, such removal rendering plaintiff's security inadequate, it was held that the sale and disposition of such fixtures and machinery could be enjoined, notwithstanding their severance and removal from the realty. Kimball v. Darling, 32 Wis. 675.

¹⁰⁷ Pratt v. Brett, 2 Madd. 62; Sunderland v. Newton, 3 Sim. 450; Lewis v. Christian, 40 Ga. 187; Hamilton v. Stewart, 59 Ill. 330; Livingston v. Reynolds, 26 Wend. (N. Y.) 115.

¹⁰⁸ Baker v. National Biscuit Co., 96 Ill. App. 228.

where it appears that the landlord is not entitled to the reversion.¹⁰⁹

§ 112. Criminal remedies—(a) Larceny.

Larceny, at the common law, is usually defined to be the felonious taking and carrying away of the personal goods of another;¹¹⁰ hence the taking and carrying away of that which is real estate or a part thereof is not, in the absence of statute, the subject of larceny.¹¹¹ Therefore there exists the

¹⁰⁹ *Perrine v. Marsden*, 34 Cal. 14.

"From the view here given of the nature of the proceeding by injunction, it appears that it is a remedy which may frequently be adopted by the reversioner for the purpose of restraining a tenant for life or for years, who intends, or rather threatens, to sever things from the freehold under a claim arising out of the law of fixtures. It seems, indeed, to be more particularly applicable where a tenant, at the expiration of his term, insists on a right of taking away substantial buildings, which the owner of the land contends are not within the privilege of removal." *Ferrard, Fixtures*, p. 225.

¹¹⁰ 4 Bl. Comm. p. 229; 8 Am. & Eng. Enc. Law (2d Ed.) p. 460.

¹¹¹ "This felonious taking and carrying away must be of the personal goods of another; for, if they are things real, or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot, in their nature, be taken and carried away; and of things, likewise, that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law, but the severance of them was, and in many things is still, merely a trespass, which depended on the subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable." 4 Bl. Comm. p. 232.

Minerals: In the case of *People v. Williams*, 35 Cal. 671, where an indictment charged that the defendant "did unlawfully and feloniously take, steal, and carry away from the mining claim of

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general rule of the common law that fixtures while annexed to the freehold, and while considered as a part thereof, are not

B. fifty-two pounds of gold-bearing quartz rock, the personal property of said B., of the value of \$400, it was held that the indictment was bad for the reason that it did not appear that there had been a severance of the rock from the ledge prior to the act complained of, and that the act was not a mere trespass. So, in *State v. Burt*, 64 N. C. 619, it was held that a nugget of gold separated from the vein by natural causes savors of the realty, and is not the subject of larceny until severed from the freehold by human agencies. But in *People v. Freeman*, 1 Idaho, 322, where the defendant was indicted for stealing "a quantity of specimens of gold and silver ores, of one hundred and fifty pounds in weight," the objection to the indictment upon the ground that the property described savored of the realty was not well taken. So, in *State v. Berryman*, 8 Nev. 262, it was held that an indictment which used the words "silver-bearing ore" in a charge of grand larceny was not bad for the reason that the words as so used meant a portion of vein matter extracted and separated from the mass of waste rock and earth, and implied a severance from the freehold.

Crops: At common law, growing crops were not the subject of larceny. *State v. Stephenson*, 2 Bailey (S. C.) 334. So, where one digs potatoes and cuts cabbages and carries them immediately away, the act is not larceny. *Bell v. State*, 63 Tenn. (4 Baxt.) 426. So, cultivated fruit is not the subject of larceny. *Bartlett v. Brown*, 6 R. I. 37, 75 Am. Dec. 675. Statutory provisions in nearly all of the states have quite generally changed this rule. Consult the local statutes.

Timber: Trees, when severed and immediately carried away, are not the subject of larceny. *Reg. v. Harris*, 11 Mod. 113. But turpentine which has flowed down the trees into boxes cut in the trees to receive it, and while ready to be dipped out, is personalty, and the subject of larceny. *State v. Moore*, 33 N. C. (11 Ired.) 70; *State v. King*, 98 N. C. 648.

Miscellaneous: Wild bees, while remaining in the tree where they are hived, are not the subject of larceny. *Wallis v. Mease*, 3 Bin. (Wis.) 546. So, seaweed, drifted and ungathered, cast on the shore between high and low water mark of the riparian owner is not

the subject of larceny, where the severance and the carrying away of the fixture by the wrongdoer are one and the same continuous act.¹¹² Thus, rails or logs in a fence, manure upon a farm, and other chattels annexed to the freehold, are not the subject of larceny.¹¹³

The reason assigned for this rule, where the severance and the asportation are by one and the same continuous act, is

a subject of larceny. *Reg. v. Clinton*, Ir. R. 4 Com. Law, 6. But oysters planted in public waters, and not where oysters usually grow, are the subject of larceny. *State v. Taylor*, 27 N. J. Law, 117.

¹¹² Where rails in a fence fixed into posts inserted in the ground are feloniously severed and carried away by one continuous act, they are not the subject of larceny. *United States v. Wagner*, 1 Cranch, C. C. 314, Fed. Cas. No. 16,630. So, logs laid into a fence, and a part of the realty, are not the subject of larceny. *United States v. Smith*, 1 Cranch, C. C. 475, Fed. Cas. No. 16,325. But in Texas, where rails in a fence are severed from the realty without the owner's consent, and with intent to feloniously take the same, the act is larceny, no matter how instantaneous the asportation may be. *Harberger v. State*, 4 Tex. App. 26, 30 Am. Rep. 157. So, it is not larceny to take and carry away the valves which are screwed to iron pipes attached to the side of a building, and used in a manufacturing business, since they are a part of the realty. *Langston v. State*, 96 Ala. 44, 11 So. 334. Copper wire permanently attached to an engine which is permanently annexed to a sugar house, and a part of the realty, is not the subject of larceny. *State v. Davis*, 22 La. Ann. 77. Manure made in the ordinary course of husbandry on farms is not the subject of larceny. *Ball v. White*, 39 Ohio St. 650. So, the box or chest in which charters are usually kept is not the subject of larceny, for the charters concern the freehold, and pass with the same. 3 Co. Inst. 109. But Baron Alderson expresses a doubt as to this in *Reg. v. Powell*, 5 Cox, C. C. 396. So, the muniments of title to real estate are not the subject of larceny at the common law. *Rex v. Westbeer*, 2 Strange, 1133. See, also, *State v. Hall*, 5 Har. (Del.) 492; *Beall v. State*, 68 Ga. 820.

¹¹³ See ante, note 112.

that the owner cannot be said to have been in possession of the fixture as personalty, and hence the wrongdoer cannot be charged, in all strictness, with taking the personal goods of another, since his very act was the means of the fixture becoming personal property, if the owner should so elect to treat it.¹¹⁴ But where there is an interval of time existing between the act of the thief in severing and carrying away the fixture, so as thereby to constitute two independent and separate acts, and the subsequent asportation is *animo furandi*, the severed property may be treated as personalty, and the act of subsequently taking it is larceny.¹¹⁵ In this connection

¹¹⁴ "And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor in this, their newly state of mobility, which is essential to the nature of larceny, being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods." 4 Bl. Comm. p. 232.

¹¹⁵ "But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and come again at another time, when they are so turned into personalty, and take them away, it is larceny; and so it is, if the owner, or any one else, has severed them." 4 Bl. Comm. p. 233. See Reg. v. Foley, 26 L. R. Ir. 299, 17 Cox, C. C. 142; Beall v. State, 68 Ga. 820; Bell v. State, 4 Baxt. (Tenn.) 426; Holly v. State, 54 Ala. 238; John's Case, 3 City Hall Rec. (N. Y.) 58; Bradford v. State, 6 Lea (Tenn.) 634. Where one unlawfully enters upon land of another, through which the waste coal from a mine is carried by a stream, and in a boat scoops up the coal lodged along the channel and bank of the stream, cleans and sifts it little by little, until he has a boat load, when he transports the same to a coal bin, and there unloads it,

the rule has been stated that at least a day must intervene between the severance and the subsequent taking, for the reason that the law does not recognize the fractions of a day; but this technical rule is now generally disregarded, and the element of time is considered only in so far as it shows the acts so separated as to constitute two independent transactions.¹¹⁶ However, there must be some interval of time between the act of severance and the asportation.¹¹⁷

In Texas the common-law rule is apparently repudiated under the holding that a severance of a fixture from the freehold immediately converts it into personal property, and that, if the fixture is then taken with felonious intent, it is larceny, though the severance and the carrying away were one and the same continuous act.¹¹⁸ This rule of the common-law, however, has been held to apply only to those things which issue out of or grow on the land, and those which adhere to the freehold,—that is, apparently, to fixtures physically annexed to the freehold, and not to those fixtures which are considered as constructively annexed.¹¹⁹ Thus, it is larceny to feloniously take a key from the lock of the door of a house.¹²⁰ So, the felonious taking of a leather belt in a saw mill, which

although the coal is a part of the realty, nevertheless the act of loading, transporting, and unloading is not so connected with the severance as to make the act one and continuous, and hence it is the subject of larceny. *Com. v. Steimling*, 156 Pa. 400, 27 Atl. 297, 33 Wkly. Notes Cas. 67.

¹¹⁶ *Com. v. Steimling*, 156 Pa. 400, 27 Atl. 297, 33 Wkly. Notes Cas. 67.

¹¹⁷ *State v. Berryman*, 8 Nev. 262.

¹¹⁸ *Ex parte Wilke*, 34 Tex. 155; *Harberger v. State*, 4 Tex. App. 26, 30 Am. Rep. 157.

¹¹⁹ *Jackson v. State*, 11 Ohio St. 104.

¹²⁰ *Hoskins v. Tarrance*, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129.

is easily removable by untying the thongs holding the ends together, is larceny.¹²¹ Likewise, window sashes fastened merely by laths nailed across the frames are the subject of larceny.¹²² Yet, muniments of title to real estate, and the box or chest containing charters, have been considered as not the subjects of larceny.¹²³

Apparently, those annexed chattels which are removable as trade, domestic, or ornamental fixtures are the subjects of larceny, particularly so in those jurisdictions where the same are regarded as personalty during the term of the tenant. Thus, chandeliers screwed into a gas pipe attached to the ceiling of a house, and personalty as between landlord and tenant, are the subject of larceny.¹²⁴ It is apprehended that the same rule would obtain in respect to those fixtures which are by agreement considered and treated as personalty.¹²⁵

In nearly all of the states, however, the subjects of larceny have been extended by statute so as to embrace many objects that are technically real estate. The statutory provisions of the different states vary somewhat in their language, but, in general, they provide that the severance and asportation of any fixture, tree, plant, or produce of the soil shall be comprehended within the subjects of larceny.¹²⁶

¹²¹ *Jackson v. State*, 11 Ohio St. 104.

¹²² *Rex v. Hedges*, 1 Leach, C. C. 201.

¹²³ *Rex v. Westbeer*, 2 Strange, 1133; *Reg. v. Powell*, 5 Cox, C. C. 396; 3 Co. Inst. 109. See ante, note 112.

¹²⁴ *Smith v. Com.*, 14 Bush (Ky.) 31, 29 Am. Rep. 402.

¹²⁵ See ante, c. 5, "Agreements as to the Character of Fixtures."

¹²⁶ But in some states the common-law rule still obtains in a measure, and things savoring of the realty are not the subjects of larceny. *State v. Parker*, 34 Ark. 158, 36 Am. Rep. 5; *Bergdahl v. People* (Colo.; 1900) 61 Pac. 228; *State v. Hall*, 5 Har. (Del.) 492. See the local statutes.

—(b) **Malicious injury or mischief.**

The punishment of malicious and willful injury to property has been made the subject of statutory provisions quite generally. In reference to fixtures and annexed chattels that are considered within that term, statutory provisions have quite generally imposed penalties for the willful severance, asportation, or destruction of houses, buildings, barns, fences, and other things attached to the freehold of another. In some states the crime is made both a felony and a misdemeanor.¹²⁷

¹²⁷ Blackstone in his Commentaries (book 4, p. 243), says: "Malicious mischief or damage is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi*, or with intent of gain by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty, or black or diabolical revenge."

Malicious mischief is the wanton or reckless destruction of or injury to property. *Flora First Nat. Bank v. Burkett*, 101 Ill. 391; *State v. Foote*, 71 Conn. 741; *State v. Watts*, 48 Ark. 56, 3 Am. St. Rep. 216; *Com. v. Williams*, 110 Mass. 401.

This crime is distinguished from larceny by the absence of *lucri causa*,—the intent to profit by the conversion of the property. *State v. Hawkins*, 8 Port. (Ala.) 461, 33 Am. Dec. 294; *Pence v. State*, 110 Ind. 95; *State v. Pike*, 33 Me. 361; *State v. Leavitt*, 32 Me. 183; *State v. Weber*, 156 Mo. 249; *People v. Woodward*, 31 Hun (N. Y.) 57; *State v. Butler*, 65 N. C. 309.

Malicious mischief is sometimes called "malicious trespass," but it is to be distinguished from the ordinary trespass in that it is both without color or pretense of right and without hope or expectation of gain. *Dawson v. State*, 52 Ind. 478; *State v. Robinson*, 20 N. C. 130, 32 Am. Dec. 661; *People v. Smith*, 5 Cow. (N. Y.) 259.

At the common law, as well as now quite generally by statutory provisions, malicious mischief extended to real property as well as to personalty. *State v. Watts*, 48 Ark. 56, 3 Am. St. Rep. 216; *State v. Wilson*, 3 Mo. 125; *State v. Batchelder*, 5 N. H. 549; *Loomis v. Edgerton*, 19 Wend. (N. Y.) 419. Consult the local statutes.

—(c) Wilful trespass.

In the statutory provisions of most of the states, a willful trespass is included and comprehended within the definition and punishment prescribed for malicious mischief or injury; yet in some of the states there are provisions of the statute imposing penalties for the willful severance of fixtures upon the realty of another.¹²⁸

¹²⁸ See ante, note 127; and consult the local statutes.

ADDENDA.

MINING FIXTURES.

Generally.

The law of fixtures in mines follows closely the general rules applicable to fixtures upon land, and there is nothing peculiar to mining fixtures except in so far as the law of mines and mining is peculiar in respect to the subject of real estate, for a mine and the minerals in place therein are real estate, and are subject to the rules and principles governing real estate as such.¹ Hence the general rule in the law of fixtures, "*Quicquid plantatur solo, solo cedit*," obtains equally as well in respect to chattels annexed to a mine or mining claim.² Thus, an engine bolted to timbers sunk in the earth, and a boiler set on rock work and connected with the engine, both of which were used in developing the mine, are fixtures.³ So, machinery in a mining plant, physically annexed to the freehold, passes to the heir.^{3a} But in

¹ Barringer & Adams, *Mines & Mining*, p. 36; *Houtz v. Gisborn*, 1 Utah, 173.

² See ante, c. 3, "The Tests and Requisites of a Fixture"; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29, 22 Am. St. Rep. 373; *Davis v. Moss*, 38 Pa. 346; *Williams' Appeal*, 1 Monag. (Pa.) 274, 24 Wkly. Notes Cas. 365, 16 Atl. 810; *Ege v. Kille*, 84 Pa. 333; *Speiden v. Parker*, 46 N. J. Eq. 292; *Dutro v. Kennedy*, 9 Mont. 101; *Dobschuetz v. Holliday*, 82 Ill. 371.

³ *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29. See ante, p. 344, c. 12, note 6.

^{3a} *Fisher v. Dixon*, 12 Clark & F. 312.
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ascertaining whether a chattel used in connection with a mine is a fixture or mere personal property, and in applying the usual tests and requisites of a fixture,⁴ it appears that especial prominence is given to the fact that the chattel in use is adapted to the use of the mine, and is suitable, proper, and necessary for the purpose of carrying on the business of mining, in determining whether the same is a part of the realty or not;⁵ that is, apparently, the test of physical annexation⁶ is not an essential prerequisite in order to constitute the chattel a part of the realty, but rather the test of adaptation to use,⁷—the fact that the chattel is suitable, proper, and necessary for the use to which it is devoted in the mine. In fact, in Pennsylvania, in this connection, physical annexation of the chattel is not required as a test in order to constitute it a fixture. Thus, all the machinery of an ore bank, whether fast or loose, which is necessary to constitute it as such, and without which it would not be an ore bank equipped and ready for use, is a part of the realty.⁸ So, in a slate quarry, the cutting and polishing benches, the derrick boom, the steam pump, etc., were held to be fixtures for the reason that the articles were suitable, proper, and necessary for the purpose of carrying on the business of mining.⁹ Likewise, in a limestone quarry, the tramway,

⁴ See ante, c. 3, "The Tests and Requisites of a Fixture."

⁵ *Ege v. Kille*, 84 Pa. 336; *Williams' Appeal*, 1 Monag. (Pa.) 274, 24 Wkly. Notes Cas. 365, 16 Atl. 810; *Baker v. Atherton*, 15 Pa. Co. Ct. R. 471; *Bewick v. Fletcher*, 41 Mich. 625; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29.

⁶ See ante, c. 3, § 18, "As to Annexation."

⁷ See ante, c. 3, § 19, "Adaptation to the Use of the Freehold."

⁸ *Ege v. Kille*, 84 Pa. 333.

⁹ *Williams' Appeal*, 1 Monag. (Pa.) 274, 24 Wkly. Notes Cas. 365, 16 Atl. 810.

cars, scales, and tipple used in mining, removing, and marketing the limestone, and necessary for carrying on the business of the quarry, are a part of the realty.¹⁰ But mere loose machinery, tools, or other chattels in and about a mine are not fixtures, in the absence of any usage or general understanding to that effect.¹¹ So, where machinery is placed in a mine without being either intended or especially adapted for permanent use as a part of the mine, and where it is removable without causing injury to the realty, the machinery remains personal property.¹²

The effect of agreement.

The parties to the sale or leasing of a mine may control, by an agreement duly made in accordance with the general principles governing in such cases as heretofore announced,¹³ the character of fixtures and chattels used in connection with the mine.¹⁴ Thus, a lease of premises for the purpose of mining iron ore, which provides that the lessee shall, at the termination of the lease, peaceably surrender the premises, etc., "and other improvements and erections that may be thereon,—engines, boilers, machinery, tools, implements, and other movable personal chattels excepted,"—makes the engines, boilers, machinery, etc., personal property.¹⁵ So,

¹⁰ *Ritchie v. McAllister*, 14 Pa. Co. Ct. R. 267.

¹¹ *Carey v. Bright*, 58 Pa. 70. See, also, *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

¹² *Hewitt v. General Electric Co.*, 61 Ill. App. 168; *Bewick v. Fletcher*, 41 Mich. 625.

¹³ See ante, c. 5, "Agreements as to the Character of Fixtures."

¹⁴ *Merritt v. Judd*, 14 Cal. 59; *Lake Superior Ship Canal, Ry. & Iron Co. v. McCann*, 86 Mich. 106.

¹⁵ *Lake Superior Ship Canal, Ry. & Iron Co. v. McCann*, 86 Mich. 106.

an agreement between the lessor and the lessee that all the steam engines, fixtures, and improvements used in connection with a coal mine, and erected by the lessee upon the premises, from materials furnished by him, may be removed and taken away at the expiration of the lease, or other determination thereof, unless the lessors or their assigns elect to retain the same, renders the same personal property.¹⁶ So, where a vendee under an option contract to purchase a mine attached certain fixtures thereto, and gave a chattel mortgage upon the same, the fixtures so attached remained personalty by reason of the agreement, even after the purchase of the mine under the contract, and the subsequent forfeiture thereof, and even as against a subsequent grantee of the mine.¹⁷ Likewise, where a lessee who has attached to the realty certain mining machinery executes a chattel mortgage thereon to a vendor, with the express agreement therein that the machinery shall not become a part of the realty, the machinery remains personalty even as against the lessor.¹⁸

¹⁶ White's Appeal, 10 Pa. 252.

¹⁷ Where purchasers of a mine under an option contract therefor were to take and develop the mine under an agreement not to allow any lien to be placed upon the mine, and where the purchasers gave a chattel mortgage upon certain chattels which were annexed to the mine, and the option was exercised, but afterwards the mine was forfeited to the owner, it was held that the purchasers had the right to treat the fixtures as personalty, and, since the mortgage was recorded prior to the forfeiture to and possession by the owners, that subsequent grantees of the mine took the same subject to the mortgage upon the fixtures. *Alberson v. Elk Creek Gold Min. Co.* (Ore.; 1901) 65 Pac. 978.

¹⁸ *Hewitt v. General Electric Co.*, 164 Ill. 420. See ante, p. 170, c. 5, "Agreements as to the Character of Fixtures," note 56. So, where the owner of certain machinery entered into a written con-

As between lessor and lessee.

Although, in respect to mines and minerals therein, a true leasehold interest cannot be said to exist, for the reason that the only practicable estate in a mine is one in fee, nevertheless a leasehold interest may be created in the land itself, with the appurtenant right to take minerals from a mine thereon during the term.¹⁹ The exceptions to the general rule in the law of fixtures accorded to a tenant likewise obtain in favor of a lessee of a mine,²⁰ except where statutory provisions may modify or qualify the rights of a lessee to fixtures in a mine.²¹

Trade fixtures.

Fixtures annexed by a lessee of a mine for the purpose of carrying on his business of mining, and used in working the mine, fall within the class denominated as "trade fixtures," and are removable by the lessee at any time before his term expires.²²

tract with a mining company to set up machinery on the land of the latter, and to take notes therefor secured by a mortgage on the machinery, and on the same day the mining company executed a mortgage on the land, containing a clause that it was subject to a mortgage, it was held that the intention was that the property should remain personalty, and hence not subject to a real-estate mortgage. *Ellison v. Salem Coal & Min. Co.*, 43 Ill. App. 120.

¹⁹ *Barringer & Adams, Mines & Mining*, pp. 36, 51.

²⁰ *Merritt v. Judd*, 14 Cal. 59; *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1.

²¹ Civ. Code Cal. 1885, § 661; Civ. Code Mont. 1895, § 1077. In Pennsylvania, the word "fixture," in accordance with the act of April 27, 1855, is not to be construed in a strict and narrow sense, but will include in a mortgage made under that act mining cars and all such machinery and appliances as are essential to the operation of a colliery. *Baker v. Atherton*, 15 Pa. Co. Ct. R. 471.

²² *Wake v. Hall*, 8 App. Cas. 195; *Merritt v. Judd*, 14 Cal. 59; *Hayes*

Thus it was held, as between a lessor and a lessee of a mine, that engines and boilers erected by the lessee on brick and stone foundations, bolted down solidly to the ground, and walled in with brick arches, and about thirty-five dwellings set on posts or dry stone walls, all of which were used exclusively for the purpose of mining iron ore, and for carrying on the business in connection therewith, were trade fixtures removable by the lessee before the expiration of his term.²³ So, where premises are leased for oil and gas purposes, and a well is sunk thereon by the lessee, the casing, the derrick, and other appliances used in drilling and operating the well are trade fixtures, and cannot be removed after the expiration of the lease by the lessee.²⁴ Likewise, engines and boilers in a quartz mill must be removed by the lessee before his term expires.²⁵ So, a steam engine, boiler, and pump embedded in a ledge sufficiently to get a level, covered by a shed, and used in working the mine, are trade fixtures, and subject to the general rules governing the same as between lessor and lessee.²⁶

So, persons who are mining on the land of another under a miner's license, and who have placed machinery thereon for the purpose of mining, may remove the same as trade

v. *New York Gold Min. Co.*, 2 Colo. 273; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95; *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. App. 153; *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817; *Heffner v. Lewis*, 73 Pa. 303; *Hewitt v. General Electric Co.*, 61 Ill. App. 168; *Bedford-Bowling Green Stone Co. v. Oman*, 24 Ky. Law Rep. 2274, 73 S. W. 1038; *White's Appeal*, 10 Pa. 252; *Lemar v. Miles*, 4 Watts (Pa.) 330; *Davis v. Moss*, 38 Pa. 346; *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1.

²³ *Conrad v. Saginaw Min. Co.*, 54 Mich. 249, 20 N. W. 39.

²⁴ *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95.

²⁵ *Hayes v. New York Gold Min. Co.*, 2 Colo. 273.

²⁶ *Merritt v. Judd*, 14 Cal. 59.

fixtures.²⁷ Likewise, a steam engine, machinery, and other fixtures attached to the realty by the lessee for the purpose of hoisting coal from mines situated thereon, including all boxes and other necessary appliances connected therewith, are trade fixtures.²⁸ But a railroad switch constructed by the lessees of the right to work and use all the free cutting stone on certain tracts of land belongs, at the expiration of the lease, to the owners of the real estate to which it is attached.²⁹

An engine house partly of stone and partly of wood, with a stone foundation, together with the engine and the other machinery used in a coal mine for working the mines by the lessee, are trade fixtures.³⁰ So, a steam engine and the necessary gearing for working a mine, erected by the lessee upon the leased premises for carrying on his business of mining, are removable as trade fixtures.³¹

A tenant who is working a mine under a mere verbal privilege, which carries with it no interest in the land, and which renders the holding a mere license, revocable at the will of

²⁷ *Springfield Foundry & Mach. Co. v. Cole*, 130 Mo. 1; *Wake v. Hall*, 8 App. Cas. 195.

²⁸ *Dobschuetz v. Holliday*, 82 Ill. 371.

²⁹ *Bedford-Bowling Green Stone Co. v. Oman*, 24 Ky. Law Rep. 2274, 73 S. W. 1038.

³⁰ *White's Appeal*, 10 Pa. 252.

³¹ *Davis v. Moss*, 38 Pa. 346. In this case Woodward, J., said: "That a tenant who erects fixtures for the benefit of his trade or business may remove them from the demised premises is an established doctrine of the law, but with this qualification: that the removal be made during the term. After the term they become inseparable from the freehold, and can neither be removed by the tenant nor recovered by him as personal chattels by an action of trover, or for goods sold and delivered." See ante, p. 217, c. 6, note 65.

the landowner, may remove his machinery and other fixtures within a reasonable time after his license is terminated.³² But in a Texas case, where trover was brought for the conversion of certain structures, such as houses, railroad tracks, and coal chutes in certain coal mines, the rule is asserted that the renewal of a provisional lease does not destroy the tenant's right to remove his trade fixtures, and that the tenant has a reasonable time after the expiration of the lease within which to remove the same.³³ So, in Colorado, under this principle, it was held that the failure of the tenant to remove certain machinery, which were trade fixtures annexed to the mining premises, within nine months after notice of forfeiture by the landlord, was not such an unreasonable time, under the circumstances, as to terminate the right of removal.³⁴

As between licensor and licensee.

Ordinarily, where there is not a written grant of a privilege of mining such as would constitute an estate or interest in lands, or where there is no leasehold interest in the lands with the appurtenant right to mine, the license or parol right to mine is merely a personal privilege, which is revocable at the will of the licensor, and passes no interest in the land or title to the mineral imbedded therein until a severance takes place by the act of the licensee.³⁵ As be-

³² *Desloge v. Pearce*, 38 Mo. 588. In Missouri it is held that a license to mine is something more than a personal privilege, and passes an interest in lands, within the statute of frauds. See Gen. St. 1889, § 7034 et seq.

³³ *Wright v. McDonald*, 80 Tex. 140, 30 S. W. 907.

³⁴ *Updegraff v. Lesem* (Colo.; 1900) 62 Pac. 342.

³⁵ See ante, c. 13, "Fixtures as between Owner of the Realty and

tween parties sustaining this relation *inter se*, the general rule is observed that an agreement is implied granting to a licensee a reasonable time within which to remove his fixtures annexed to the mine after the license is terminated.³⁶

As between grantor and grantee.

As between grantor and grantee of a mining claim, or of the land upon which a mine is situated, the same general rule which is applicable to like parties in the conveyance of other real estate obtains, and all chattels that are actually or constructively annexed to the mine, and are adapted and essential to the use of the mine, pass by a conveyance thereof.³⁷ Thus, an engine bolted to timbers sunk in the earth, and a boiler set on rock work, both being essential to the working of a mine, pass as a part of the realty to the grantee.³⁸ So, in the sale of land upon which there is a slate quarry and factory, all fixtures thereon which are necessary for the purpose of carrying on the business of mining and manufacturing pass with the realty.³⁹ Likewise, the drum-hoisting works of a mine.⁴⁰ So, the machinery in a stone quarry.⁴¹ In the sale of a coal plant, where the articles of agreement

a Stranger to Title," § 106, "The Effect of License"; Barringer & Adams, Mines and Mining, p. 67.

³⁶ *Desloge v. Pearce*, 38 Mo. 588; *Updegraff v. Lesem* (Colo.; 1900) 62 Pac. 342; *Wright v. McDonald*, 80 Tex. 140, 30 S. W. 907. See, also, *Springfield Foundry & Machine Co. v. Cole*, 130 Mo. 1; *Wake v. Hall*, 8 App. Cas. 195.

³⁷ See ante, c. 7, "Fixtures as between Grantor and Grantee," § 44, "General Rule."

³⁸ *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.*, 15 Colo. 29.

³⁹ *Williams' Appeal*, 1 Monag. (Pa.) 274, 24 Wkly. Notes Cas. 365. 16 Atl. 810.

⁴⁰ *Speiden v. Parker*, 46 N. J. Eq. 292.

⁴¹ *Dutro v. Kennedy*, 9 Mont. 101.

include the chutes, tipples, sidings, and cars with the coal under a tract of land, and also the privilege of mining and removing the coal for a specified period of time, the chutes, tipples, sidings, cars, and other appliances connected with the mining and transportation of the coal pass to the vendee as his fixtures absolutely.⁴² So, as between an execution purchaser of land at a sheriff's sale, on which there are boiler houses, blacksmith shops, side tracks, stationary engines, boilers, and other appliances used in operating a coal mine, and the coal company as owner of the same, the fixtures enumerated pass as a part of the realty.⁴³

⁴² *Montooth v. Gamble*, 123 Pa. 240.

⁴³ *Off v. Finklestein*, 100 Ill. App. 14.

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